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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL J. HALLIWELL,
Appellant,

v.

MARCH FONG EU, SECRETARY OF STATE
OF THE STATE OF CALIFORNIA,
Appellee,

and

THE SENATE AND ASSEMBLY
OF THE STATE OF CALIFORNIA,
Appellee-Intervenors

On Jurisdictional Transfer from the
Ninth Circuit Court of Appeals
Under 28 U.S.C. § 1631

APPENDIX A TO JURISDICTIONAL STATEMENT

Pursuant to Rule 15.1 j(i), (ii), and (iii)

In Propria Persona

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PREFACE

Rule 15.1(j)(i) requires that the compilation of prior orders in the case begin with those findings of fact and conclusions of law which were delivered on rendering of the judgment which is being appealed. The orders which come closest to satisfying this requirement are the District Court's order of August 5, 1985, which gave rise to this mandamus proceeding, and the Ninth Circuit's August 19, 1986 denial of jurisdiction.

The order of August 5, 1985 reaffirms the holding of the order of July 9, 1985, "[T]his action is DISMISSED in its entirety, without leave to amend." That sua sponte termination of proceedings was tacked onto a discussion which declares one of Plaintiff's claims moot while failing to address three claims still before that court. The order of August 5, 1985 is as follows:

> "Plaintiff has filed a motion for reconsideration of the Court's order of July 9, 1985, which dismissed this action. The Court has determined that it may dispose of this motion without the benefit of oral argument. Accordingly, the motion is hereby submitted on the record and papers currently before the Court. See Local Rule 230(h), E.D.Cal. (1984).
>
> "Plaintiff's basis for seeking reconsideration is a disagreement with the Court's reasoning in disposing of this case. This is insufficient. See Local Rule 230(k). The appropriate method for challenging this court's reasoning is an appeal to an appropriate tribunal.
>
> "Accordingly, Plaintiff's motion is DENIED without leave to renew it.
>
> "IT IS SO ORDERED."

The order of August 19, 1986 provides:

> "The Supreme Court has exclusive jurisdiction over this appeal. 28 U.S.C. § 1253; MTM, Inc. v. Baxley, 420 U.S. 799 (1975); Fusari v. Steinberg; 419 U.S. 379 (1975). Appellees' motions to dismiss the appeal for lack of jurisdiction are denied. The Clerk will transfer the appeal to the Supreme Court of the United States. 28 U.S.C. § 1631."

The Ninth Circuit's order of August 19, 1986 is reaffirmed by its order of November 5, 1986, which says only, "Appel-

lant's petition for reconsideration of the order transferring this appeal to the Supreme Court of the United States is denied."

These orders are also found in their chronological sequence in the main body of this volume, to satisfy the sequence required by Rule 15.1(j)(iii).

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judge Lawrence K. Karlton

Item #1 (2 Record 301-302)

Rulings on April 14, 1982 and May 3, 1982

(This item relates important procedural rulings by Judge Karlton during the initial phase of litigation. There was no court reporter at either of the two hearings where these rulings were made, but the issues involved are documented by the written submissions of Plaintiff and Defendant.)

Plaintiff discusses "Defendant's Challenge to Validity of Service" at 11 Record 7-9:

> "On March 9, 1982 the Secretary of State filed a dismissal motion (1 Record 20-26) which crossed in the mail with Plaintiff's inclusive brief. This motion sought dismissal 'on the ground that the defendant has not been properly served with process in this action.' (1 Record 20.) This contention was based on the fact that Plaintiff personally served papers on Anthony L. Miller, Chief Counsel for the Secretary of State. Mr. Miller made no objection to the form of service at the time he received Plaintiff's summons and complaint and in fact engaged in a substantial discussion relating to the future conduct of the case. The Secretary of State waited until the very end of the 20-day response period before challenging the adequacy of service, and her dismissal motion was slated for consideration ANOTHER FORTY-EIGHT DAYS AFTER THAT.
>
> "On March 15, 1982 Plaintiff filed a response[1.01] which thoroughly demonstrated the frivolous nature of the Secretary of State's challenge to sufficiency of service. (1 Record 276-300.) Furthermore, in rejecting a challenge to sufficiency of service of process based on a technical application of the Rules of Civil Procedure, the Court of Appeals in Securities and Exchange Commission v. Reisinger

Industries (1977) 552 F.2d 15, 20 notes:

> 'The purpose of service of process is to give a party notice of the proceedings in sufficient time to prepare an adequate defense. None of the defendants here can claim, in good faith, that they did not know of the action against them or that they were deprived of an opportunity to be heard on the issues.'

Reisinger is applicable with even greater force in these proceedings, since JUDGE KARLTON DOCKETED AN ABSURD MOTION WHEREIN THE SECRETARY OF STATE, IN A JURISDICTION CHOSEN FOR HER CONVENIENCE, ARGUED THAT SHE HAD NOT BEEN PROPERLY NOTIFIED EVEN THOUGH SHE PLAINLY KNEW ALL ABOUT THIS ACTION AND ALLEGED NO HARM FROM THE SUPPOSED DEFECT IN SERVICE.

"Judge Karlton simply ignored Plaintiff's counter motion, which concluded his response to the challenge to sufficiency of service: 'For the foregoing substantive procedural and equitable reasons Plaintiff hereby urges that Defendant's motions to abort consideration of this case be summarily dismissed.' At the hearing of April 14, 1982 Judge Karlton ruled that a second service of Plaintiff's inclusive complaint by a non-party was invalid (see proof of service of Ms. Pat Powers at 1 Record 275) on the ground that a second summons did not accompany the complaint EVEN THOUGH DEFENDANT'S COUNSEL WAS

> STANDING BEFORE HIM IN COURT. This rigid formalism was completely out of keeping with the Federal Rules of Civil Procedure.
>
> > 'Our Federal Rules were adopted and are intended to liberalize our actions and TO REMOVE THE MANACLES OF TECHNICALITIES WHICH HAD PREVIOUSLY OBSTRUCTED PROCEDURE IN COURTS OF JUSTICE. They are intended to bring out the truth.' Dubois Brewing Co. v. United States (1963) 34 F.R.D. 126, 127. Emphasis added."

Plaintiff's account of the dispute over service of process continues at 11 Record 13:

> "Since Judge Karlton indicated at the April 14, 1982 hearing that he considered Plaintiff's arguments in favor of the validity of service on the Secretary of State to be unpersuasive, Plaintiff made arrangements with Mr. John Woods to have another summons and complaint served on Defendant. This third service of papers was accomplished on April 15, 1982.[1.02] (See 2 Record 300 for proof of service.)"

Plaintiff discusses the delay in proceedings caused by the continuing dispute over service of process at 11 Record 15-16:

"Plaintiff's status conference report of April 26, 1982 (2 Record 319-324) noted that 'Plaintiff seeks [an] opportunity for early consideration of evidence relating to the contested districts,' called the Court's attention to his pending proposals for remedial action, and protested that 'the "run-out-the-clock" strategy of the proponents of the contested districts has progressed to the point where rapid resolution of this case is necessary to minimize practical problems in election administration.'

"In defendant's status conference report (2 Record 325-327) the Secretary of State renewed her challenge to the validity of service on the ground that the assistant who accepted the April 15, 1982 service of papers on behalf of the Secretary of State was not authorized to do so:

> 'Defendant asserts that she has not been properly served pursuant to Rule 4(d)(6) of the Federal Rules of Civil Procedure. A summons and complaint was personally delivered and left with one of the support staff in Defendant's Sacramento business office on April 15, 1982.'

"This status report also noted: 'Defendant believes that candidates seeking office in these districts should be named as indispensable parties to this action so that they may have an opportunity to be heard. Defendant believes that any change in the district bounda-

> ries would impair the candidacy for each candidate that relies upon the existing district boundaries.'
>
> "Plaintiff rebutted Defendant's contentions concerning the validity of service in his brief of April 30, 1982. (2 Record 348-349.) At this same time Plaintiff completed a FOURTH service of papers pursuant to California Code of Civil Procedure § 415.20. On the basis of this fourth service, counsel for Defendant withdrew her renewed challenge to validity of service at the May 3, 1982 status conference." [1.03]

Plaintiff's Contextual Footnotes

1.01 Plaintiff notes at 11 Record 9:

"In his March 15, 1982 response brief Plaintiff included alternate motions to expedite consideration (1 Record 301-310). The Court was urged to establish a specific calendar for consideration of legal arguments and remedial proposals and to promptly require a responsive pleading from the Defendant. When Plaintiff contacted Judge Karlton's law clerk to find out why no action had been taken to establish a calendar for consideration of his pending motions he was told that according to Judge Karlton, '<u>You can't just invent motions.</u>'"

1.02 Defendant withdrew her challenge to service of process in response to Plaintiff's third service of papers. Defendant's Notice at 2 Record 301-302 states:

"TO: MR. MICHAEL J. HALLIWELL, 2930 Colorado AVenue #D-18, Santa Monica, California 90404.

PLEASE TAKE NOTICE that Defendant MARCH FONG EU intends to withdraw her motion to dismiss filed in this court on March 9, 1982, with leave of the court.

DATED: April 19, 1982

ANTHONY L. MILLER, Chief Counsel
RICHARD B. MANESS, Staff Counsel
WILLIAM P. YEE, Staff Counsel
By /s/ William P. Yee, Staff Counsel
Attorneys for Defendant

MARCH FONG EU"

On April 21, 1982 Judge Karlton signed the following order submitted by Defendant:

"DEFENDANT hereby requesting this court to permit withdrawal of her motion to dismiss without prejudice, such request is granted by order of this court."

1.03 Plaintiff contends at 15 Record 77: "Notwithstanding the fact that the motions which [challenged Plaintiff's service of process] were withdrawn by Defendant just before the Court was about to rule on them, they are of enduring significance in this case because of the delay in adjudication which they caused. In Staub v. Baxley (1958) 355 U.S. 313, 320 the U.S. Supreme Court ruled out as contrary to due process of law procedures which 'force resort to an arid ritual of meaningless form.' A defendant whose counsel stands in a court whose jurisdiction and venue is unchallenged and argues repeatedly that proceedings should be delayed to cure a formal defect in her notification is clearly resorting to the most meaningless of arid rituals."

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judge Lawrence K. Karlton

Item #2 (2 Record 290)

Filed April 27, 1982[2.01]

This matter having come on for hearing on April 14, 1982,[2.02] and the Court having been fully advised,[2.03] the motion of Plaintiff for Temporary Restraining Order is denied.

Rubber stamped: Lawrence K. Karlton
U.S. District Court Judge

Dated: April 23, 1982

Plaintiff's Contextual Footnotes:

2.01 This order was prepared by Defendant and lodged with the Court on April 16, 1982.

2.02 Plaintiff describes the background of this order at 11 Record 9-11:

"Plaintiff was told that [his April 1, 1982] TRO proposal could be considered by Judge Karlton on Friday, April 2, 1982 without participation by Defendant, but that if Plaintiff wished to allow the Secretary of State to respond he would have to delay consideration of the matter until Judge Karlton returned from his vacation on April 14, 1982. Since there was no chance that this sort of temporary restraining order would be granted on an ex parte basis, Plaintiff agreed to an April 14, 1982 hearing date. On April 3, 1982 Plaintiff filed his TRO motion (2 Record 1-12) along with his recommendations for "Minimal Modifications to A.B. 300 Districts to Provide Constitutional Assembly Districts in Time for the June 1982 Primary" (2 Record 66-170) by mail to the Court and the Secretary of State.

"On April 13, 1982 the Secretary of State filed her response (2 Record 13-65) to Plaintiff's TRO motion with the court clerk (located only a few blocks from the Sacramento office of the Secretary of State) and MAILED A DUPLICATE TO PLAINTIFF IN SANTA MONICA, WHICH HE RECEIVED ON THE DAY AFTER THE HEARING (note filing stamp on Plain-

tiff's copy at 2 Record 13). This tactic left the Court plenty of time to study Defendant's arguments before the hearing but prevented Plaintiff from preparing a rebuttal.

"Plaintiff learned at the April 14, 1982 hearing that during Judge Karlton's vacation the Secretary of State had completed all the activities which Plaintiff sought to restrain. Her counsel contended that completion of these activities made any temporary restraining order an 'idle' order. Whatever excuse there may be for a federal judge's giving his vacation plans priority over the expedited hearing requirement of 28 U.S.C. § 2284(b)(2), it was outrageous for Judge Karlton to allow his vacation to be thus exploited to evade a temporary restraining order at such a critical juncture. Moreover, if Plaintiff had been accorded an opportunity to prepare a rebuttal to the Secretary of State's brief he could have pointed out that the fact that instructions for the printing of ballots had already been issued to the local registrars did not preclude the issuance of a court order to revoke those instructions. The policy of avoiding the issuance of mandatory injunctions on which Judge Karlton relied is NOT applicable to voting rights cases.

> 'In this vital area of vindication of precious constitutional rights, we are unfettered by the negative or affirmative character of the words used or the negative or affirmative form in which the

coercive order is cast. If affirmative relief is essential, the court has the power and should employ it.' Bell v. Southwell (1967) 376 F.2d 659, 665.

"Judge Karlton refused to consider Plaintiff's thoroughly documented contention that it was still feasible to implement his proposed whole-precinct swaps to minimize constitutional flaws in the contested districts. (See 2 Record 66-287 and wall-sized illustrative maps, docket item 8F: 5 Record 3.)"

2.03 Paragraph #2 of Plaintiff's August 23, 1982 affidavit describes (at 4 Record 304-305) the process of consideration at the April 14, 1982 hearing:

"a. At the start of the April 14, 1982 hearing on Plaintiff's proposed temporary restraining order Plaintiff's presentation was immediately curtained by Judge Karlton, who undertook 'to dispose of this matter' based on a memorandum from the Secretary of State.

b. This memorandum was filed with the Court in Sacramento on the day before the hearing but mailed to Plaintiff in Santa Monica so that it was delivered on the day after the hearing.

c. This memorandum disclosed that between the time when the Secretary of State was notified (on April 5, 1982) of Plaintiff's proposed temporary restraining order and the time of the hearing all the activities which Plaintiff had sought to

restrain had been undertaken.
d. Counsel for the Secretary of State conceded at the hearing that local registrars probably had not acted on their recent instructions from the Secretary of State and that it was still possible to halt printing of ballots for the June 8, 1982 primary in those districts whose constitutionality was disputed through this would add to the costs of conducting the primary.
e. Judge Karlton declared, 'This Court has no authority to tell local officials how to conduct elections' and ruled against Plaintiff's motion without allowing him any opportunity to discuss the constitutional issues involved or the administrative feasibility of his proposed restrictions."

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judge Lawrence K. Karlton

Item #3 (2 Record 318)

Filed April 21, 1982

This action having been assigned to Judge Lawrence K. Karlton,

IT IS ORDERED that a Status Conference in the above entitled case will be held on May 3, 1982, at 2:00 p.m. in Courtroom No. 1, before Judge Lawrence K. Karlton, pursuant to Local Rule 125.[3.02]

The parties shall appear in person or through counsel. Such status conference shall not be continued. Each party shall file a status report[3.03] with the court and serve same upon opposing counsel not later than three (3) work days prior to the date set for hearing. The report shall briefly set forth the views of the party making the report on the following matters:

(a) Service of process on parties not yet served;

(b) Jurisdiction and venue;

(c) Anticipated motions;

(d) Anticipated or outstanding

discovery;

(e) Further proceedings, including setting dates for a further status conference if necessary, discovery cutoff, pre-trial and trial;

(f) Appropriateness of special procedures such as reference to a special master or Magistrate or the Judicial Panel on Multidistrict Litigation, or application of the Manual for Complex Litigation.

(g) Modification of the standard pre-trial procedures specified by the Rules because of the relative simplicity or complexity of the action or proceeding;

(h) Prospects for settlement; in this regard, counsel shall report to the court concerning his party's willingness to

stipulate that the trial judge may act as a settlement judge;

(i) Any other matters which may be conducive to the just, efficient and economical determination of the action or proceeding.

It is contemplated that as a result of this conference a formal order will issue regarding the future course of litigation.

Plaintiff is directed to serve copies of this order at once upon those parties subsequently joined and file with the clerk of the court a certificate reflecting such service.

Rubber stamped: Lawrence K. Karlton
United States District Judge

Dated: April 21, 1982

Plaintiff's Contextual Footnotes:

3.01 This order setting status conference is a standard form with the date and time filled in.

3.02 This conference was called pursuant to Plaintiff's request noted at 11 Record 14:

> "On April 19, 1982 Plaintiff sent his proposed revisions of the contested districts to the reapportionment consultants of potential intervenors (see 2 Record 287-288 for proof of service) to allow sufficient lead time for their development of criticism of the administrative feasibility of or the constitutional justifications for the suggested revisions.
>
> "On April 19, 1982 Plaintiff also filed a detailed protest of Judge Karlton's conduct of the case (2 Record 304-316) and requested a status conference 'to work out a framework whereby Defendant's stalling tactics can at last be terminated and this case can be adjudicated on its merits, thereby ensuring that justice is done for the citizens of California.'"

3.03 Plaintiff notes (at 11 Record 16-18) the import of the delaying tactics protested in his status report:

> "In his April 30, 1982 brief Plaintiff warned that under Herron v. Koch (1981) 523 F.Supp. 167, 174 the stalling tactics of the Secretary of State would make it necessary to postpone the primary elec-

tion unless the Defendant promptly ceased her efforts to thwart adjudication on the merits. Plaintiff also warned that:

> 'If government of the people, by the people and for the people does indeed perish in this country it is unlikely that this will happen as a result of a military coup against a government which the citizens consider to have been fairly elected. It is much more likely that the legitimacy of our elected officials will first be destroyed by a series of actions such as those by the Secretary of State in the present case.' (2 Record 346.)
>
> '[A] large portion of whatever legitimacy Californians still accord to their elected representatives will be destroyed if the "run-out-the-clock" strategy of the proponents of A.B. 301, S.B. 99 and A.B. 300 succeeds. This will occur if these districts are employed because of practical considerations (engineered by incumbent office holders) even though the districts are expected to be [and were] overwhelmingly rejected by California voters and even though they do not embody even the feeblest "good faith effort" to satisfy applicable constitutional requirements. On the other hand, should the federal courts consider the constitutional merits

of the contested districts and then rule that these districts are constitutional and constitutionally enacted, legitimacy will have been preserved even though this lawsuit is lost.' (2 Record 347.)"

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judge Lawrence K. Karlton

Item # 4 (3 Record 42-43)

Filed May 4, 1982

Pursuant to court order, a Status Conference was held in court on May 3, 1982.[4.01] Plaintiff MICHAEL J. HALLIWELL represented himself in propria persona; MICHAEL YEE appeared as counsel for defendant MARCH FONG EU; JOSEPH REMCHO appeared as counsel for defendants in intervention Assembly of the State of California, et al., and THERESA M. FERGUSON appeared as counsel for defendant in intervention Senate of the State of California. After hearing, the court makes the following findings and orders:

1. Pursuant to the stipulation of the plaintiff and defendant MARCH FONG EU, the court has granted the Assembly of the State of California, the Honorable Willie L. Brown, Jr., the Honorable Richard Alatorre, the Honorable Art Agnos, and the Senate of the State of California leave to intervene as defendants in this action. All current

defendants have stipulated that service of process upon them has been completed. The clerk of the court is directed to file the Answer submitted by defendants in intervention Assembly, et al., and that Answer is hereby deemed served on all parties.

2. Defendant in intervention Senate is hereby directed to bring on a motion to dismiss the instant complaint no later than May 3, 1982.

3. The remaining defendants in intervention (i.e., the Assembly, et al.) are hereby directed to bring on a motion to dismiss and/or for summary judgment in the instant action. The mentioned motion is to be filed and served no later than May 24, 1982.

4. The plaintiff's opposition, if any, to the motions brought on by the defendants in intervention is to be served and filed no later than June 1,

1982.

5. The replies, if any, of the defendants in intervention to the plaintiff's opposition (if any) are to be filed and served no later than June 8, 1982.[4.02]

6. A hearing will be held on the motions to dismiss and/or for summary judgment on June 11, 1982, at 9:00 a.m.

7. It now appears that the plaintiff may still obtain a legally efficacious remedy should he prevail on the merits of this action after this court disposes of the motions brought on pursuant to this order. Resolution of all other matters is therefore deferred pending the court's disposition of the aforementioned motions.[4.03]

8. There appear to be no other matters presently pending before the court that will aid the just and expeditious disposition of this matter.[4.04]

IT IS SO ORDERED.

/s/ Lawrence K. Karlton
U.S. District Judge

Dated: May 4, 1982

Plaintiff's Contextual Footnotes:

4.01 There was no court reporter present at the May 3, 1982 status conference. The major events at this conference are described in paragraphs 3-9 of Plaintiff's August 23, 1982 affidavit (at 4 Record 305-306).

"3. During the week preceding the status conference of May 3, 1982 Plaintiff was contacted twice by Ms. Nina Rivkind of the firm of Rosen and Remcho, counsel for the Assembly. In these conversations Ms. Rivkind assured Plaintiff that intervention by the Assembly would not delay proceedings. Subsequent to Plaintiff's agreement to intervention by the Assembly a stipulation to this effect was sent to Plaintiff via express mail with prepaid express mail return and was filed with the Court prior to the May 3, 1982 status conference.

4. At the May 3 status conference the Senate also petitioned to intervene and immediately filed a brief in support of a motion to dismiss Plaintiff's action.

5. At the status conference counsel for the Assembly announced that he was unprepared to proceed and asked for three weeks to prepare a dismissal motion. He was initially granted only two weeks by Judge Karlton.

6. Because the time for mail delivery of an opposition brief had severely handicapped Plaintiff in previous proceedings he asked for one week after he actually received the Assembly's motion

to dismiss in which to prepare and mail his response. In order to include time for mail delivery Judge Karlton agreed to two weeks for Plaintiff's response period.

7. Since counsel for the Assembly was able to appear in court only on Fridays and the Friday four weeks after the status hearing was already taken on the Court's calendar, the hearing on motions to dismiss was set for the Friday five weeks from the status conference, June 11, 1982.
8. At this point counsel for the Assembly asked for and received the extra week so he could have three weeks for his preparation. None of the defendants asked for an opportunity to rebut Plaintiff's response to their motions and no such rebuttal was filed.
9. At the hearing Plaintiff vehemently protested the delays which resulted from the lack of preparedness and limited courtroom availability of counsel for the Assembly. The commitment not to delay proceedings was called to the Court's attention and not denied by counsel for the Assembly. Plaintiff also pointed out that the 'margin of victory - change in revised district' standard which he had proposed for deciding which primaries must be invalidated would be unfair unless candidates were advised of it prior to June 8th. Plaintiff further pointed out that the primary election was the crucial one for ethnic minority candidates and that these candidates

are usually much less well financed and therefore much less able to adapt to any remedy which required an unanticipated new primary election. Plaintiff explicitly protested the Court's procedural conduct of the case which threatened to make the calendar, not the Constitution, the decisive factor."

4.02 This briefing schedule violated the agreement reached at the May 3 conference. This violation of agreed briefing arrangements and the resulting adverse impact on Plaintiff's ability to defend against dismissal of his claims is discussed in paragraphs 10-13 of Plaintiff's August 23, 1982 affidavit (at 4 Record 307-308):

"10. The status conference order of May 4, 1982 took away half of the two weeks agreed upon at the status conference for Plaintiff's response in order to provide a one-week period for rebuttal by Defendants. Rather than violating the status conference agreement and the provisions of Local Rule 113 which provide a 14-day interval between filing deadlines of moving and responding parties, the Court should have cut the Assembly back to the originally agreed-upon two weeks for preparation if a rebuttal period was deemed to be essential.

11. Every communication which Plaintiff has received from Rosen and Remcho's San Francisco

office has taken two days to reach Santa Monica -- except for the dismissal motion and supporting brief submitted for the June 11th hearing. This submission arrived five days after the date of mailing indicated on the proof of service. Also unlike any other communication from Rosen and Remcho, this brief had no signature or other name identification anywhere on Plaintiff's copy of proof of service.

12. Because the latter part of Plaintiff's shortened response period was the long Memorial Day weekend, he was left with only two days in which to research his response to the Assembly's dismissal motion.
13. This was not the first time that Rosen and Remcho had gained a considerable advantage by a late submission. In Assembly v. Deukmejian Rosen and Remcho served Plaintiff and presumably the other parties in Deukmejian with a critically important statistical 'refutation' on the day before the oral hearing in that case."

4.03 Plaintiff discusses this aspect of the order at 11 Record 21-22.

"Judge Karlton's decision to relay on post-election remedies was vociferously protested by Plaintiff. After Plaintiff had made every effort to facilitate earlier intervention by both the Assembly and the Senate it was completely unfair

for Judge Karlton to refuse to act upon Plaintiff's long-pending motions for pre-election adjudication on the merits so that the Court could consider intervenors' dismissal motions. Post-election remedies are sometimes required when a lower court decides a case erroneously, but it is completely unprecedented for a district judge to wait nearly four months to perform his preliminary screening function under 28 U. S.C. § 2284, when a constitutional challenge is filed almost immediately after a statewide redistricting plan is adopted and the elections process is underway.

"Plaintiff is a former candidate for the State Legislature and is familiar with the problems of organizing such a campaign. Plaintiff beseeched Judge Karlton to consider the predicament of a candidate who may invest all the money he is able to raise and the irreplaceable efforts of many volunteers in an effort that may be completely negated by post-election changes to legislative districts. Plaintiff pointed out that the primary election is often the critical one for ethnic minority candidates and that these candidates have a much more difficult time than others in raising the resources to conduct an effective campaign for major political office. None of this made any impression on Judge Karlton, who mumbled something about life being unfair and deferred all action in the case until June 11, 1982."

4.04 Plaintiff lists matters then pending before the Court, consideration of which was further postponed by this ruling, at 11 Record 22-23.

"In Item #8 above Judge Karlton apparently ruled out all of Plaintiff's pending motions on the ground that they would not 'aid the just and expeditious disposition' of the case. Motions which Plaintiff had filed and sought in vain to have considered by Judge Karlton included proposals to:

1. enjoin the implementation of the contested districts (Feb. 19, 1982, March 10, 1982).
2. conduct the 1982 elections with the most constitutional of the model plans submitted in these and prior proceedings (Feb. 19, 1982, March 10, 1982, Apr. 15, 1982).
3. postpone the primary election until constitutionally adequate districts have been put into place (March 10, 1982, Apr. 15, 1982).
4. establish a calendar for consideration for all stages of this litigation (March 15, 1982).
5. require a responsive pleading by the Secretary of State (March 15, 1982).
6. conduct the 1982 elections with the contested districts revised to minimize their constitutional defects (Apr. 15, 1982)."

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judge Lawrence K. Karlton

Item #5 (4 Record 39-63)

Filed July 1, 1982

Plaintiff, acting as attorney pro se, has filed a 222 page (amended) complaint under 42 U.S.C. § 1983 challenging the constitutionality of the apportionment plans under which California voters are scheduled to elect representatives to the State Assembly and Senate and to the United States House of Representatives in November, 1982. Defendant Secretary of State of the State of California March Fong Eu and defendants in intervention Assembly of the State of California, et al. have brought on motions to dismiss the complaint on the bases that this court lacks jurisdiction over the subject matter of the action and that the complaint fails to state a claim upon which relief can be granted. I conclude that plaintiff has stated a claim over which this court has jurisdiction and upon which relief may be granted. I nonetheless dismiss the

plaintiff's amended complaint in order to allow him the opportunity to comply with the pleading requirements of the Federal Rules of Civil Procedure.[5.01] Finally, for the reasons explained below, all further proceedings in this case shall be presided over by a three-judge court, pursuant to 28 U.S.C. § 2284.

I

THE FACTUAL AND PROCEDURAL BACKGROUND

In September, 1981, in response to the decennial census, the California Legislature reapportioned California's Assembly and Senate districts, and the United States Congressional districts in the state. The California Republican Party and the Republican National Committee commenced a petition campaign to qualify referenda on each of the plans in the hope that the voters would reject the apportionment schemes designed by the legislature.

The petition drive was successful and the referenda were placed on the ballot for California's June 7, 1982, primary election. Attempting to block the referenda, or at least to vitiate the effect of the successful petition drive, several state Senate and Assembly members and congressional representatives sought writs of mandate from the California Supreme Court. In Assembly v. Deukmejian, 30 Cal. 3d 638 (1982), the California Supreme Court ruled that the referendum petitions were valid, that the apportionment plans were appropriate subjects for referenda, and that the effect of the qualified referenda was to stay implementation of the reapportionment statutes "until and unless [the statutes are] approved by a majority of the qualified electors voting thereon...." Id. at 655, quoting from California Constitution former article IV,

section 1. Thus the Court held that the new apportionment statutes would not take effect until after they were voted upon in the June 7, 1982, primary, and would only take effect if they were approved in that election. Id. at 655-57.

Having decided that the new reapportionment statutes could not take effect, the Court was faced with the problem of what districts should be used for the impending elections. The Court held that the old districting schemes, based on the previous decade's census, "no longer [met] the one-person, one-vote requirement embodied in the equal protection clauses of our state and federal Constitutions." Id. at 657. The Court also found that there was not sufficient time either to draft alternative apportionment plans or fully to consider alternatives tendered by the Republican National Committee, et al., without

seriously disrupting the 1982 elections in California. Id. at 658. A majority of the Court thus concluded that the only viable option consistent with state and federal equal protection requirements and the federal decisions in the area was to implement the new, stayed apportionment plans for the limited purpose of conducting the 1982 elections. [Footnote: Three justices concurred with the majority regarding the validity and effect of the referendum petitions, but disagreed with the decision to adopt the new apportionment plans as court-ordered plans for the 1982 elections. Rather, the minority would have followed the procedure employed by the Court under analogous circumstances the decade before (in Legislature v. Reinecke, 6 Cal. 3d 595 (1972)), i.e., using the newly designed congressional districts in order to comport with strict federal require-

ments, but relying on the old, preapportionment plans for the state Senate and Assembly districts. Assembly v. Deukmejian, 30 Cal. 3d at 679-93 (concurring and dissenting opinion of Richardson, J.).] The majority therefore adopted the electoral district apportionment statutes passed by the legislature as temporary, court-ordered plans only for the purpose of conducting the 1982 elections.

The Republican National Committee, et al., filed an appeal with the United States Supreme Court, [Footnote: The appeal was made to the United States Supreme Court on very limited grounds, and does not now appear to preclude the instant lawsuit.] and asked Justice Rehnquist to stay use of the new congressional districts pending consideration of that petition. The stay request was denied (Republican National Committee

v. Burton, ___U.S.___, 50 U.S.L.W. 3766 (March 23, 1982)), and the full Court summarily disposed of the case by dismissing the appeal for want of jurisdiction and then, treating it as a petition for writ of certiorari, denying that petition. 50 U.S.L.W. 3857 (April 27, 1982).

Michael Halliwell, the plaintiff in the case at bar, was not a party to Assembly v. Deukmejian or the ensuing appeal. He did, however, participate in the California Supreme Court's proceedings as amicus curiae. If Mr. Halliwell was a friend of the California Court for purposes of those proceedings, his friendship now appears to have degenerated into a bitter antipathy, characterized by attacks on that Court's procedures and on the integrity and sagacity of its members. As best I can discern, Mr. Halliwell seeks an order from this

court enjoining the November general elections from taking place under the plans mandated by the California Court; broadly stated, the basis for his request is that the decision in Assembly v. Deukmejian was contrary to the United States Constitution.

The only defendant named by Mr. Halliwell in the first instance was March Fong Eu in her capacity as California's Secretary of State. The California Assembly (and certain named members of that body) and the California Senate have intervened as defendants to this action and have brought on the motions to dismiss mentioned above. Defendant March Fong Eu essentially has joined in those motions. As I shall explain, these motions do not fatally pierce the plaintiff's lawsuit. They are, however, a useful tool with which to hack away the necrotic claims and attached allegations,

arguments, innuendo, and creative legal theories which form the bulk of this massive, sprawling complaint. In this manner I hope to reveal whether there is any living tissue consisting of cognizable constitutional claims buried within this great flaccid carcass. Before essaying this task, however, I shall briefly set forth the standards which govern the consideration of the defendands' motions.

II

THE APPLICABLE STANDARDS

The defendants have based their motions both on Federal Rule of Civil Procedure 12(b)(1) and on Rule 12(b)(6). Each of those procedural devices invokes a separate standard for reviewing the sufficiency of the complaint.

In evaluating a motion to dismiss a complaint for failure to state a claim (Fed.R.Civ.P. 12(b)(6)), the court must

accept as true the allegations of the complaint. Cruz v. Beto, 405 U.S. 319, 322 (1972). The court is also to construe the complaint in the light most favorable to the plaintiff. Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969). Moreover, a complaint may not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Scheuer v. Rhodes, 416 U. S. 232, 236 (1974).

The contrasting approach to motions brought under Fed.R.Civ.P. 12(b)(1) -- seeking dismissal for lack of subject matter jurisdiction -- has been summarized by Professors Wright & Miller in the following terms:

[T]he complaint will be construed

> broadly and liberally, in conformity with the principle set forth in Rule 8(f), but argumentative inferences favorable to the pleader will not be drawn. In addition, the pleading will be read as a whole with any ... uncontroverted factual allegations being accepted as true. ...[If] the allegation of jurisdiction is insufficient or entirely lacking but there are facts pleaded in the complalint from which jurisdiction may be inferred, then the motion must be denied.

5 Wright & Miller, Federal Practice and Procedure: Civil § 1350, pp. 551-52 (1969) (footnotes omitted). With these standards in mind I now turn to the claims advanced by the plaintiff.

III

THE PLAINTIFF'S CLAIMS

As I have indicated, Mr. Halliwell makes a number of claims and advances a plethora of legal theories that relate marginally or not at all to any legally cognizable injury that he has suffered. In order to chart a course through the rhetorical morass created by the plaintiff, I shall attempt to fix my compass

on the specific legal harms that Mr. Halliwell claims to have suffered. As I shall demonstrate, this approach inevitably eliminates the great majority of the plaintiff's claims and theories.

A. Procedures Employed by the California Court

One of the central claims asserted by the plaintiff is that the California Supreme Court conducted its proceedings in such a prejudicial fashion that he was effectively denied due process of law in violation of the fourteenth amendment to the United States Constitution. In this regard, the plaintiff alleges that the California Court refused to consider evidence relevant to the legality and efficacy of the plans that it adopted and similarly refused to consider alternative plans tendered by the Republican National Committee, et al.; that the Court violated relevant ethical

standards; that it unfairly refused to consider evidence tendered by the plaintiff and disregarded his requests that it reconsider its ruling, etc.

It is clear that Mr. Halliwell has no standing to complain of procedural irregularities in the California Court's proceedings, for he was not a party to those proceedings and thus there was no particular process due him either as amicus curiae or as an interested spectator. See Knetch v. United States, 364 U.S. 361, 370 (1960). Even assuming, arguendo, that the Republican National Committee, et al., who were parties to the action were treated in an unconscionable manner by the California Court, that does not give Mr. Halliwell a claim cognizable in this court.[5.02] A party 'may not seek redress for injuries done to others.' Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1972); Laird

v. Tatum, 408 U.S. 1, 13 n. 7 (1972).[5.03]

To the extent, therefore, that Mr. Halliwell complains of the judicial procedures employed by the California Supreme Court in its consideration and disposition of Assembly v. Deukmejian, he has not stated a claim upon which relief may be granted and indeed he cannot state such a claim. All claims of this nature in the plaintiff's amended complaint are hereby dismissed without leave to amend.[5.04]

B. Rights Allegedly Guaranteed by State Law

In a similar vein, Mr. Halliwell emphatically asserts that the California Supreme Court's decision effectively deprives him of rights guaranteed him by California state law. The California Court did so, he claims, by misinterpreting or wholly ignoring state consti-

tutional provisions [Footnote: In this regard, plaintiff's chief concern is with article XXI of the California Constitution, which governs the reapportionment of electoral districts and article II, section 9 which includes the "referendum stay" provisions. Specifically, he appears to be most concerned with section 1(c) of article XXI (which requires that "Every district shall be contiguous"), and section 1(e) (which directs that the geographical integrity of cities, counties, etc., be respected "to the extent possible" when boundaries are drawn).] and its own applicable precedent. [Footnote: Plaintiff is particularly indignant at the court's refusal to follow Legislature v. Reinecke, 6 Cal. 3d 595 (see n.1, supra).]

It scarcely bears citation that "state courts are the ultimate expositors of state law and [the federal courts]

are bound by their constructions...." Mullaney v. Wilbur, 421 U.S. 684, 691 (1975); accord, Garner v. Louisiana, 368 U.S. 157, 166 (1961).[5.05] Moreover, "[s]tate courts have the authority to interpret and, where they see fit, to reinterpret[5.06] the state's [laws]." Knapp v. Cardwell, 667 F.2d 1253, 1260 (9th Cir. 1982); citing Garner, supra. [Footnote: An exception arises, of course, when the state court's interpretation of state law "is clearly untenable[5.07] and amounts to a subterfuge to avoid federal review of a deprivation by the state of rights guaranteed by the [United States] Constitution." Knapp v. Cardwell, 667 F. 2d at 1260; accord, Mullaney v. Wilbur, 421 U.S. at 691 n. 11. Mr. Halliwell has not made any such allegations in the instant case. Rather, he makes precisely the opposite argument: that the California Court's allegedly erroneous inter-

pretation of federal law was really just a subterfuge by which the state court sought to avoid compliance with its own constitution.[5.08] Put bluntly: whether the decision in Assembly v. Deukmejian accords with California law is not and cannot be a matter of concern to this court.] It follows that the California Court could not have abridged the plaintiff's right under California law in a manner cognizable by this court, for to the extent that those rights are susceptible to definition by a court of law, the California Supreme Court is the final authority as to what those rights are.[5.09] Thus to the extent that the complaint is based on alleged violations of the plaintiff's rights under California law,[5.10] it must be dismissed without leave to amend for this court lacks jurisdiction over the subject matter of those claims. [Footnote: it is true, of

course, that state law may create and define the specific interests that are protected under the federal Constitution; thus a state's deprivation of an individual's rights may comprise a deprivation of life, liberty or property without due process of law in contravention of the fourteenth amendment, even though the interests involved have been delineated by state law. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). That problem is not posed by the case at bar, however. In the first place, as I have explained, rights under state law exist only to the extent that the state Supreme Court recognizes their existence; this court cannot create rights in the plaintiff based on state law beyond those recognized by the final arbiter of state law.[5.11] Secondly, even if California is depriving the plaintiff of an interest

protected by the fourteenth amendment, that fact would only provide the beginning, rather than the end of the requisite analysis. "Nothing in [the Fourteenth] Amendment protects against all deprivations of life, liberty or property by the State. The Fourteenth Amendment protects only against deprivations 'without due process of law.'" Parratt v. Taylor, 451 U.S. 527 (1981). It could hardly be said that Mr. Halliwell was denied due process by the State of California, for he never sought to invoke the processes of the state except in his attempts to influence the California Supreme Court from his perch as amicus curiae in Assembly v. Deukmejian. As I have explained, a person acting as a friend of the court is not a party, and is not entitled to any particular procedural protections. In short, even if we assume that the California Court's

interpretation of California law worked to deprive the plaintiff of some cognizable interest,[5.12] "the question remains what process [was] due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The answer in this case is: none.]

C. Ethical and Political Discrimination

Mr. Halliwell claims that his constitutional right to equal protection under the law was violated by the adoption of plans that, he contends, were designed to dilute the voting strength of certain minority groups within the state. It is true that political gerrymandering for the purpose of diluting the electoral strength of racial or ethnic minority groups is proscribed by the fifteenth amendment to the United States Constitution. [Footnote: The fifteenth amendment provides in section 1 that "[t]he right of citizens of the

United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[5.13] It seems obvious that discrimination against members of racial and ethnic minorities in the exercise of the franchise also implicates the equal protection guarantees of the fourteenth amendment. See Connor v. Finch, 431 U.S. 407 (1977); Gaffney v. Cummings, 412 U.S. 735, 751 (1973), and cases cited therein; Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960). As Mr. Halliwell conceded at oral argument, however, he is not a member of any such ethnic or racial group. Once again, whatever the merits of his claim of unlawful political discrimination against persons of color, the plaintiff simply lacks standing to press that claim. Laird v. Tatum, supra.[5.14]

Mr. Halliwell is even more vociferous, however, about his charge that the districting plans were designed to discriminate against a minority group to which he does belong -- California's registered Republicans. The plaintiff arguably has standing to complain of political gerrymandering that invidiously discriminates against members of his political party.[5.15] Unfortunately for Mr. Halliwell, however, the partisan drawing of districts in a manner designed to maximize the electoral strength of the majority political party does not in itself give rise to a claim cognizable by this court. Gaffney v. Cummings, 412 U.S. 735, 752-55 (1973); Russo v. Vacin, 528 F.2d 27, 29 (7th Cir. 1976);[5.16] but see Mobile v. Bolden, 446 U.S. 55, 86-87 (1980) (Stevens, J. concurring in the judgment). As Justice White stated on behalf of a majority of the Court:

"The reality is that districting inevitably has and is intended to have substantial political consequences." Gaffney v. Cummings, 412 U.S. at 753. [Footnote: The plaintiff relies on dicta in Connor v. Finch, 431 U.S. 407 (1977) for the proposition that political gerrymandering that would be permissible -- or at least immune from judicial review -- in the context of a legislatively-drawn plan is impermissible and subject to collateral attack if embodied in a court-ordered plan. Mr. Halliwell's reliance is misplaced. The only question considered by the Court in Connor v. Finch was whether the districts contained in a reapportionment plan for the Mississippi Legislature, designed by a three-judge federal district court, varied so greatly from absolute population equality as to offend the constitutional guarantee of one person, one vote. The Court did

not consider or even mention any claims of partisan political gerrymandering. Although it did caution district courts to undertake reapportionment tasks "circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination'" (431 U.S. at 415, quoting Roman v. Sincock, 377 U.S. 695 (1964)), the only form of discrimination about which the Court expressed concern was invidious discrimination based on race.[5.17] Perhaps most importantly, the Court's cautionary message was specifically imparted to federal courts that step in when the institutions of the state are unable to "reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." Id. This follows from the Court's oft-repeated injunction that "reapportionment is primarily the duty and responsibility of the State through

its legislature or other body, rather than of a federal court." Chapman v. Meier, 420 U.S. 1, 27 (1975) (emphasis added), citing Reynolds v. Sims, 377 U. S. at 586; Maryland Committee v. Tawes, 377 U.S. at 676. In the instant case, it is not a federal court decision that is being scrutinized -- nor could this federal court review the order of another. Rather, at issue here is a plan implemented by the state body with the final -- if not the primary -- responsibility to take action in these matters. The plaintiff has offered no reason why this court should treat the California Supreme Court as if it were an inferior federal court rather than treating it as what it is: a branch of state government coequal to and, for these purposes, possessed of the same authority as the state legislature. Cf. Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980);

Garner v. Louisiana, 368 U.S. 157 (1961); Winters v. New York, 333 U.S. 507 (1948).] The state of our law on this point was summarized by Judge Gee of the Fifth Circuit, writing for a three judge district court:

> Were we to accept in full plaintiffs' view of defendants' actions -- that they represent a politicized drawing of boundaries having as its aim precisely and nothing but the perpetuation in power of the dominant body in a state political subdivision -- plaintiffs would confront nothing that minority political bodies have not faced in the South and elsewhere, from time immemorial. That the practice is odious and unfair is too patent to require discussion; we take it as granted. But much in the political process is, or may be made, unfair, and we hold no general warrant to correct inequity. The United States and all state Constitutions contemplate representative, rather than town-meeting, government in the legislative branch. So long as this is so it will be possible that the views of any minority in any given political subdivision will go unrepresented, except insofar as the sense of fairness of the representative elected by the dominant faction moves him to give it voice and effect. One such view will be on how boundaries of political subdivisions should be drawn, and into

> the opposing views on this question will doubtless sometimes enter unfortunate considerations of maximizing the voting power of some political blocs and dispersing that of others on a territorial basis -- gerrymandering. But, though Gomillion teaches that this may not be done on racial grounds, courts have stood abashed before its accomplishment on others, finding no constitutional tool to apply and, perhaps, fearing that judicial intrusion so near the heart of the political process would be a desperate remedy worse than the disease.

Jimenez v. Hidalgo County Water Improvement District No. 2, 68 F.R.D. 668, 674 (S.D.Tex. 1975) (footnotes omitted), aff'd, 424 U.S. 950 (1976).[5.18]

I do not mean to suggest that the alleged distortion of election districts to serve political ends is irrelevant to the question of whether deviations from absolute population equality are justifiable under the standards set out in Wesberry v. Sanders, 376 U.S. 1 (1964) and Mahan v. Howell, 410 U.S. 315 (1973). To the extent, however, that Mr. Halli-

well is claiming that the alleged gerrymandering constitutes a violation of his rights per se, those claims must be dismissed without leave to amend, for they are not cognizable by this court.

D. The Guaranty Clause

In an attempt to make this mass of undigestible claims palatable, the plaintiff mixes them into a stew and serves it up as a claim based on the Guaranty Clause.[5.19] Article IV, section 4 of the United States Constitution provides in part: "The United States shall guarantee to every State in this Union a Republican Form of Government...." This clause, the plaintiff feels, prohibits the California Supreme Court and other state officials from acting as they did and provides him with a justiciable claim.

The plaintiff would be hard put to choose a less promising vehicle for his

lawsuit. Rightly or wrongly, the Guaranty Clause has become the paradigm of the nonjusticiable constitutional claim. In an unbroken line of cases, commencing with Luther v. Borden, 48 U.S. (7 How.) 1 (1849), the Supreme Court has held that claims arising under that clause are to be resolved through the political process, and may not be addressed in a lawsuit. Thus as long ago as 1937, Justice Cardozo commented that "the enforcement of that guarantee, according to the settled doctrine, is for Congress, not the courts." Highland Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937).[5.20] Mr. Halliwell relies principally on Baker v. Carr, 369 U.S. 186 (1962), to bolster his argument; despite his voluminous arguments, however, I am at a loss as to why he believes that case supports him.[5.21] In addition to cataloguing the prior cases that had rejected

Guaranty Clause claims, the Court in Baker v. Carr flatly states that "Guaranty Clause claims involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable." Id. at 218. Finally, I note that since Baker v. Carr, the federal courts have consistently emphasized that private citizens' Guaranty Clause claims may not be adjudicated. See, e.g., O'Hair v. Hill, 641 F.2d 307, 310 (5th Cir. 1981); Davids v. Akers, 549 F.2d 120, 126 (9th Cir. 1977); Bd. of Public Utilities v. City of Kansas City, 496 F.Supp. 389, 396-97 (D.Kan. 1980); Kaelin v. Warden, 334 F.Supp. 602, 606 (E.D.Pa. 1971). [Footnote: In recent years some courts have suggested, in dicta, that a state may be able to assert a cognizable claim under the Guaranty Clause when the conduct of federal officials so encroaches on the functioning

of state government as to threaten the integrity of the states in the federal system. See Brown v. EPA, 521 F.2d 827 (9th Cir. 1973), vacated, 431 U.S. 99 (1977); see also District of Columbia v. Train, 521 F.2d 971 (D.C.Cir. 1975), vacated sub nom. Costle v. District of Columbia, 431 U.S. 99 (1977). Whatever the merits of that theory, it is manifestly not the one espoused by the instant plaintiff. On the contrary, Mr. Halliwell seems to want the federal government to become more, rather than less involved in the way in which California manages its affairs.]

The plaintiff's theory seems to derive from the fact that many cases in which a Guaranty Clause claim was asserted, or at least implicated, were nonetheless adjudicated by federal courts. It is true, as Professor Wright points out, that "the nonjusticiability

of claims resting on the guaranty clause does not mean that similar questions will be held non-justiciable if other provisions of the Constitution such as the equal protection clause, are in issue." C. Wright, Federal Courts 53 (3d ed. 1976). Thus to the extent to which Mr. Halliwell has claims that are cognizable under other provisions of the Constitution -- and the equal protection clause is indeed an apt example -- those claims are not barred by virtue of their relationship to the Guaranty Clause.[5.22] It does not follow from the fact that some of Mr. Halliwell's claims are cognizable by this court, however, that those claims or any others may be adjudicated as arising under the Guaranty Clause. This court lacks jurisdiction over the subject matter of Guaranty Clause claims; any such claims that do not have an independent and cognizable

basis are hereby dismissed without leave to amend.

E. One Person, One Vote

Having discussed at length the claims that cannot be raised in this lawsuit, I can now focus on those core problems made by the plaintiff that may actually be adjudicated here. Mr. Halliwell alleges that the districts to be employed in the November, 1982 general election vary in size to an impermissible degree, and that the court-ordered apportionment plans thus effectively dilute the strength of his vote and so violate the one person, one vote guarantees of article I, section 2 of the United States Constitution and the Equal Protection Clause of the fourteenth amendment to that Constitution. It is beyond cavil that such claims may be litigated by this plaintiff in this court. Baker v. Carr, supra; Reynolds

v. Sims, supra; Wesberry v. Sanders, supra.

The defendants content that Mr. Halliwell, who sues merely as a taxpayer, a citizen, and a California voter, lacks standing to bring an action based on these claims. To support their position, the defendants cite a series of Supreme Court decisions issued over the last decade that limit even more strictly the standing of citizens and taxpayers to litigate constitutional claims when the injury complained of is suffered primarily by the "general public." See Valley Forge Christian College v. Americans United, ___U.S.___, 70 L.Ed.2d (1982); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974).

There can be no doubt that the doctrine of standing to sue has shrunk appreciably in the years since the Supreme

Court announced that voters have standing to challenge the constitutionality of state legislative apportionment schemes in federal Baker v. Carr, supra. Given these doctrinal changes, Justice Powell's suggestion that "Baker v. Carr may have a special claim to sui generis status" (United States v. Richardson, 418 U.S. at 195 n.17 (Powell, J., concurring)) rings all too true. The fact remains, however, that no matter how anomalous Baker v. Carr may seem, in light of recent cases, it is still the law on this point. No subsequent case has overruled the Baker v. Carr holding; to the contrary, the Supreme Court has regularly entertained apportionment challenges brought by citizens throughout the twenty years since that case was decided. See, e.g., Connor v. Finch, 431 U.S. 407 (1977); Chapman v. Meier, 420 U.S. 1 (1975); White v. Weiser, 412

U.S. 783 (1973). The challenge to plaintiff's standing to sue is without merit.

Little need be said regarding the defendants' contention that "as a matter of comity, abstention, equity and federalism, this court should refuse to review plaintiff's complaint." As the Supreme Court has commented about the leading abstention doctrine, "this principle does not, of course, involve the abdication of federal jurisdiction but only the postponement of its exercise." Harrison v. NAACP, 360 U.S. 167, 177 (1959). In the case at bar, there are no pending or anticipated state proceedings that will dispose of the matters in issue, save and except the November election which may render those issues moot. Quite simply, there is no proper basis for abstention in this case. As for comity and federalism, those doc-

trines neither require nor permit this court to reject out of hand a constitutional challenge to reapportionment plans devised by a state, whether those plans were adopted by the state legislature or by a final decision of the state's highest judicial body. Lastly, notions of equity may indeed be dispositive in this case. See Reynolds v. Sims, 377 U.S. 533, 585 (1964). Such equitable considerations, however, will be entertained if and when the court considers what remedies, if any, may be afforded to the plaintiff. These considerations do not bear on the question of whether the plaintiff has properly invoked the jurisdiction of this court, or whether he has stated a claim upon which relief can be granted.

The defendants' remaining challenges to the complaint are even less substantial. They assert, in essence, that the

plaintiff has not pleaded the elements of a section 1983 claim with sufficient specificity, and that the plaintiff's claims lack merit. Both sets of objections miss the point of the motion to dismiss procedure in this notice-pleading system. I reiterate that the question is not whether the complainant has pled his claim with specificity; on the contrary, the suit may not be dismissed without leave to amend "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); accord, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Similarly, "[t]he issue is not whether a plaintiff's success on the merits is likely but rather whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims." DeLaCruz v.

Tormey, 582 F.2d 45, 48 (9th Cir. 1978), cert. denied, 441 U.S. 965 (1979).

Based on the standards outlined above, I must conclude that Mr. Halliwell has stated a claim over which this court has jurisdiction and upon which relief may be granted -- he has alleged that the Congressional and State Assembly and Senate districts which are set to be used in the upcoming election vary so greatly in population size that if the plans are employed, his right to a full and equal vote will be impermissibly compromised. [Footnote: At oral argument the plaintiff stipulated that he had no claim under the "one person, one vote" doctrine regarding the planned use of the newly apportioned State Assembly districts. Subsequently, however, he has filed papers with this court seeking to withdraw that stipulation. He now states that the stipulation was offered in

reliance on information he received at the hearing from counsel for the defendants in intervention Assembly, et al., but that the information he received does not appear to be correct. The Ninth Circuit has summarized the rules regarding stipulations and relief therefrom:

> Stipulations are entered into in order to dispense with proof over matters not in issue, thereby promoting judicial economy at the convenience of the parties. 9 J. Wigmore, Evidence §§ 2588, 2597 (3d ed. 1940). Courts thus enforce stipulations as a general rule, absent circumstances tending to negate a finding of informed and voluntary assent of a party to the agreement. Id. at § 2590. A district court's decision to relieve a party from a stipulation will not be reversed when the party has entered into it by inadvertence and the opposing party would not be prejudiced (i.e., treated unfairly) by setting the agreement aside.

United States v. McGregor, 529 F.2d 928, 931-32 (9th Cir. 1976); accord, United States v. Montgomery, 620 F.2d 753, 757 (10th Cir. 1980). In the present case I

am satisfied that the stipulation offered at oral argument by Mr. Halliwell was due to inadvertence, and that such inadvertence is particularly understandable in light of the fact that he is litigating a complex case in propria persona. More important, I can see no sense in which the defendants in intervention Assembly, et al. have been prejudiced by the offer of stipulation, its acceptance, and its subsequent withdrawal. The court therefore will permit the plaintiff to withdraw from the stipulation entered into at oral argument. This brings me to another matter which must be addressed, and I hope settled once and for all. Mr. Halliwell is apparently resolute in his determination to drown his opponents and this court in paper. To this end, with his request to withdraw from the stipulation Mr. Halliwell included a quantity of additional legal

argument on the points discussed at the hearing on this matter.[5.23] In addition, some two weeks after the hearing was held Mr. Halliwell decided on his own initiative to favor this court with a "Supplemental Memorandum on Standing."[5.24] This continual, untimely filing of legal arguments with the court is wholly inappropriate: it is anathema to the orderly procedures of the court, and more importantly deprives Mr. Halliwell's opponents of their due process rights equally to argue their side of the dispute. The time for filing briefs relative to the motions under consideration is set out in this court's Local Rule 113. That time has long since passed. Mr. Halliwell has not been given leave of court to file any further written argument on these matters. Accordingly, the court has not considered and will not consider the arguments contained

in Mr. Halliwell's post-hearing briefs. In this regard, the Clerk of the Court has been directed not to accept the most recent document for filing, but instead to return the document to the plaintiff.[5.25]] On the basis of this claim, and this claim alone, the plaintiff must be allowed to proceed.[5.26]

IV

A SHORT AND PLAIN STATEMENT

Rule 8(a) of the Federal Rules of Civil Procedure provides in part that "[a] pleading that sets forth a claim for relief ... shall contain ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled." Rule 8(e)(1) provides in part: "Each averment of a pleading shall be simple, concise, and direct." I have already noted that Mr. Halliwell's amend-

ed complaint runs well over 200 pages. If he had set out to do so, he could hardly have been more successful in violating the letter and the spirit of Rule 8.

My concern with the length and obscurity of the complaint does not derive merely from formal considerations. Mr. Halliwell's prolix and distended pleading fairly illustrates the necessity for the standards set out in Rule 8: it is difficult at best to discern from the complaint what specific injuries plaintiff claims to suffer, and what specific remedies he would have this court provide.[5.27] The necessary allegations and prayer for relief are obscured by plaintiff's wholly inappropriate attempts to present in his complaint all the evidence that he believes is relevant and to counter all anticipated arguments. A complaint may not

properly double as an "inclusive brief."

The motion to dismiss the complaint must be granted so that plaintiff may once again amend his complaint. This time the plaintiff is directed to set forth a short and plain statement of the relief that plaintiff seeks. Bertucelli v. Carreras, 467 F.2d 214, 215 (9th Cir. 1972); Agnew v. Moody, 330 F.2d 868, 870 (9th Cir. 1964).

V

CONVENTION OF A THREE JUDGE COURT

According to 28 U.S.C. § 2284, "[a] district court of three judges shall be convened when ... an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." Given that Mr. Halliwell is challenging the apportionment both of California's congressional districts and of its two statewide legis-

lative bodies, it seems clear enough under the terms of the statute that a three-judge court must be convened.[5.28]

Defendants in intervention Senate, et al., argue that the three-judge court requirement of section 2284 does not apply unless the action in question challenges an apportionment statute. Because the instant case consists only of a challenge to court-ordered apportionment plans, these defendants claim that section 2284 may not properly be invoked. Aside from informing the court that this is their position on the matter and that they are currently litigating the question in another, perhaps related lawsuit in the Northern District of California, the defendants have given the court very little argument or authority to support that position. Some dicta from a federal district court opinion [Footnote: Federation for American

Immigration Reform v. Klutznick, 486 F. Supp. 564, 577 (D.D.C. 1980). The Klutznick case did not involve an apportionment plan devised by a legislature or by a court. Rather, it was an attack on the constitutionality of the 1980 United States census. The plaintiffs alleged that because it included "illegal aliens" in its population figures, the census would result in a distortion of "absolute population equality" for purposes of apportioning election districts. The effect, according to the plaintiffs, would be an unconstitutional dilution of the voting strength of citizens residing in districts with smaller proportions of "illegals." The three-judge court which considered that case concluded, inter alia, that census challenges need not be heard by a three-judge court. Accordingly, the three-judge court as a whole and District Judge Oliver Gasch, one of

the members of that court, simultaneously certified that they had arrived at the same conclusion and dismissed the case. That case is just not in point.] and a thoroughly inconclusive scrap of legislative history [Footnote: The passage quoted by these defendants is: "Subsection (a) would also continue the requirement for a three-judge court in cases challenging the constitutionality of any statute apportioning any statewide legislative body." 1976 U.S. Code Cong. & Ad. News, 2000.] do not provide a basis for me to conclude that section 2284 does not mean exactly what it says: that when state apportionment plans are challenged in a federal lawsuit, a three-judge court must be convened.

While engaging two additional judges hardly seems an efficient use of judicial resources, I do not see that doing so would cause any prejudice whatsoever

to the defendants. In short, as counsel for the defendants in intervention Assembly, et al. suggested, to convene a three-judge court in this case may not be necessary but it seems the better part of valor to do so.

CONCLUSION

The motions to dismiss the complaint for failure to state a claim upon which relief may be granted, and for lack of subject matter jurisdiction are denied. The plaintiff's amended complaint is dismissed, however, so that he may draft new pleadings consistent with this order[5.29] and with the provisions of Fed.R.Civ.P. 8. Accordingly, the plaintiff is directed to file with the court and serve on all defendants within thirty (30) days of the effective date of this order a new complaint. That pleading shall be denominated "Second Amended Complaint," and shall set forth a short

and plain statement of those claims which are cognizable in this court -- i.e., the claims based on the alleged violation of the plaintiff's voting rights protected by the "one person, one vote" guarantees of the United States Constitution. The new complaint shall also contain a concise statement of the relief which the plaintiff seeks; the details of plaintiff's proposals should not be included. Finally, the plaintiff is directed not to assert any claims that have been discussed in this order and dismissed without leave to amend.[5.30]

Upon filing and service of the plaintiff's Second Amended Complaint, the court shall request that the Chief Judge of this Circuit convene a three-judge court pursuant to the procedure set out in 28 U.S.C. § 2284(b).

IT IS SO ORDERED.

/s/ Lawrence K. Karlton
U.S. District Judge

Dated: June 30, 1982

Plaintiff's Contextual Footnotes:

5.01 Plaintiff responds at 11 Record 59:

"This statement ignores the fact that plaintiff had filed a 17-page opening complaint at the outset of proceedings and that complaint was 'amended' to 222 pages by the addition of supporting evidence in plaintiff's effort to expedite rebuttal. The motions of both intervenors were focused on the original pleading (Senate's motion at 7 and 10, 3 Record 14, 17; Assembly's motion at 7 and 11, 3 Record 236, 240). In its brief addressing this original complaint the Senate did complain of a lack of clarity (at 3 Record 15), but BEFORE JUDGE KARLTON RULED ON THE SENATE'S MOTION plaintiff had already provided the needed clarification with his case outline, which provided a well-organized enumeration of plaintiff's claims. (3 Record 384-389.)"

5.02 Plaintiff responds at 16 Record 414-415:

"Judge Karlton ignores the fact that standing depends upon whether one has been injured, not upon whether he had any procedural rights in the proceedings which gave rise to the injury. If, as Plaintiff alleges, the California Supreme Court has arbitrarily abridged Plaintiff's voting rights by invoking a compelling practical necessity which never existed for the use of the contested districts, he certainly has standing to pursue this

grievance. In Baker v. Carr (1962) 369 U.S. 186, 207-208 the U.S. Supreme Court ruled:

> 'These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. . . . A citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution. . . . They are entitled to a hearing and to the District Court's decision on their claims. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he recieves an injury." Marbury v. Madison 1 Cranch. 137, 163.' Emphasis added."

5.03 Plaintiff responds at 11 Record 71-73:

> "Neither Irvis nor Laird v. Tatum provides any basis for the notion that Plaintiff lacks standing to challenge the utter disregard of due process of law whereby the California Supreme Court reached the FACTUAL conclusions which form the basis for its action in Assembly v. Deukmejian that completely abrogated PLAINTIFF'S rights as a signer of referendum petitions HELD VALID BY THE CALIFORNIA HIGH COURT, petitions which should have prevented the contested districts from being put into effect. Judge Karlton has chopped off the first half of a sentence from Irvis and substituted

a subject without any of the qualifiers included in the original sentence: 'Appellee has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others.' 407 U.S. at 166. Irvis goes on to describe the circumstances of that appellee which make it inappropriate for him to assert the rights of others:

> 'While this court has held that in exceptional situations a concededly injured party may relay on the constitutional rights of a third party in obtaining relief, Barrows v. Jackson, 346 U.S. 249 (1953), in this case appellee was not injured by Moose Lodge's membership policy since he never sought to become a member.' 407 U.S. at 166-167.

The 'exceptional circumstances' set forth in Barrows involve 'the need to protect fundamental rights'; there are no more fundamental rights than the voting rights at stake in Halliwell v. Eu. '[O]ther rights, even the most basic, are illusory if the right to vote is undermined.' Wesberry v. Sanders (1964) 376 U.S. 1, 17. It can hardly be argued that Plaintiff's political rights were not injured by the action of the California Supreme Court in Assembly v. Deukmejian, since PLAINTIFF'S OWN RIGHT to block implementation of the contested districts was abrogated. Laird v. Tatum deals only with a hypothetical 'chilling' of rights, not outright abrogation such as has occurred in Halliwell v. Eu."

5.04 Plaintiff argued (at 7 Record 93-94 in support of his January 7, 1983 motion to reconsider Judge Karlton's exclusion of his Due Process claims:

"As Wright & Miller note in Federal Practice and Procedures § 4025,

> 'The requirements of due process apply to state court enforcement of state rights as well as federal rights -- state procedure can never be independent of the requirements of due process.' Id. at 726.

There was absolutely no visible relation between the California Supreme Court's expressed concern that it choose the redistricting plans which were the 'most constitutional and least disruptive alternative' and its actual selection of the Legislature's redistricting plans, which were the most difficult to administer and least constitutional of all the alternatives available (see 5 Record 297-362), as was demonstrated in Chapters 2, 3 and 4 of Plaintiff's inclusive brief (see 1 Record 73-173).

"None of the defendants has offered any rebuttal to Plaintiff's allegations of gross violations of minimal procedural requirements in the adoption of the Legislature's redistricting plans. Even if such a rebuttal were offered and believed by Judge Karlton this would still provide no basis for Judge Karlton's dismissal of Plaintiff's due process claims. The Supreme Court ruled in Warth v. Seldin (1975) 422 U.S. 490, 501:

> 'For purposes of ruling on a motion to dismiss for want of

> standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'
>
> "Judge Karlton is of course correct in his assumption that cognizable interests were involved when the California Supreme Court mandated the use of the contested districts. The United States Supreme Court could hardly have been more explicit in Reynolds v. Sims (1964) 377 U.S. 533, 568 that voters have a federally protected right to properly apportioned legislative districts:
>
> > 'This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of "government of the people, by the people, [and] for the people."'"

5.05 Plaintiff responds at 11 Record 74: "Judge Karlton clearly believes that the principle which he asserts scarcely bears a COMPLETE citation, for he chops the 'except for extreme circumstances' caveat out of Mullaney and cites nothing at all from Garner, where the U.S. Supreme Court unanimously reversed the Louisiana Supreme Court.

"The furthest that the U.S. Supreme Court has gone in the direction indicated by Judge Karlton is in Hebert v. Louisiana (1927) 272 U.S. 312, where the court indicates that ordinarily interpretations of

STATUTES by a state's highest court have the same force as if the words of the court's interpretation were actually written into the statute. But Hebert requires that a binding state-court interpretation of state law 'be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' id. at 316. In Halliwell v. Eu the California Supreme Court has not merely adopted interpretations which are inconsistent with the fundamental principles of liberty and justice which lie at the foundation of all our civil and political institutions, it has devastated the political institutions themselves."

5.06 Plaintiff responds at 11 Record 76: "The authority to reinterpret state law when a court sees fit does not allow state courts to apply the new interpretation without 'fair notice' to those affected by it. Bouie v. City of Columbia (1964) 378 U.S. 347, 352. Overturning Legislature v. Reinecke I (1972) 6 Cal.3d 595, 602-603 and ON THE SAME DAY implementing 'the only available plans' which satisfied the new standards obviously denied 'fair notice' to the opponents of the Legislature's redistricting plans."

5.07 Plaintiff responds at 11 Record 77: "It is no longer necessary for Plaintiff to attack the passing reference to California's equal protection clause in Assembly v.

Deukmejian (1982) 30 Cal.3d 638 at 672, '[O]ur state's equal protection clause (see art. I, § 7), adopted in 1974, has "independent vitality" which at times may require greater protection than that afforded by the federal Constitution.', as an untenable state ground; for the U. S. Supreme Court in Michigan v. Long (1983) 103 S.Ct. 3469, 3477 ruled that 'independent state grounds' which consist only of unexplicated passing references to state law cannot preclude federal review of a state court's interpretation of federal law."

5.08 Plaintiff responds at 11 Record 78: "Judge Karlton cites NO INTERPRETATION OF CALIFORNIA LAW which precludes any of Plaintiff's claims. Probably the clearest example of politically motivated unequal protection of the laws accorded by the California Supreme Court to California Republicans involves diametrically opposite APPLICATIONS of the post-census redistricting requirement of Article XXI: where a redistricting plan for the Board of Equalization was available which complied with all the requirements of Article XXI and was not barred from being put into effect by a referendum challenge the California Supreme Court aided the Democratic Party by requiring the use of the old Board of Equalization districts in 1982; where the Democratic Party stood to gain from new districts for the State Legislature which flouted the requirements of Article XXI and were blocked by valid

referendum petitions, the California Supreme Court ordered the new districts into effect."

5.09 Plaintiff responds at 11 Record 80-82:

"The duty of construing a state's law is indeed entrusted to a state's supreme court, but as the Kansas Supreme Court notes, when a law is plain on its face, there is no room for construction.

> 'The general rule is that where the statute is plain and unambiguous, there is no room left for judicial construction so as to change the language employed therein.' Harris v. Shanahan I (1963) 387 P.2d 771, 783.

No state court may simply ignore a state law, much less a state constitutional provision, in its exercise of equitable discretion. Nor may a state court apply differing interpretations of state law in comparable circumstances without establishing a principled distinction which can pass muster under the Equal Protection Clause of the Fourteenth Amendment. Plaintiff has not asked this Court to 'create rights based on state law,' but only to enforce rights which plainly exist under any conceivable interpretation of the California Constitution. Moreover, the most important of Plaintiff's rights under state law, the right to block implementation of legislation by referendum, has been recognized in scores of decisions by the California Supreme Court as one of the most

vital rights accorded by the California Constitution. For instance, in Associated Home Builders Inc. v. City of Livermore (1976) 18 Cal.3d 582, 591 the California High Court ruled:

> 'The Amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the Progressive Movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it "the duty of the courts to jealously guard this right of the people" [citation], the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process" [citation]. "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." [Citations.]'"

5.10 Plaintiff notes at 11 Record 83-84: "Where a common nucleus of facts exists and where a litigant

ordinarily would expect to try his federal and state claims in a single proceeding, the exercise of pendent jurisdiction over state law claims is strongly recommended by the U.S. Supreme Court. United Mine Workers v. Gibbs (1966) 383 U.S. 715, 725; Rosado v. Wyman (1970) 397 U.S. 397, 405; Hagans v. Levine (1974) 415 U. S. 528, 545-546. Where a state law claim is more clearcut than the federal claims in a case, the exercise of pendent jurisdiction is mandatory. This was recently squarely affirmed by the Supreme Court in Schmidt v. Oakland Unified School District (1982) 73 L.Ed. 245, 246-247, where the Court unanimously vacated a judgment of the Ninth Circuit in which the lower court had refused to consider a potentially decisive state law claim and remanded with instructions that such claims must be considered under pendent jurisdiction."

5.11 Plaintiff responds at 16 Record 409-410:

"The notion that 'rights under state law exist only to the extent that the state supreme court recognizes their existence' is incompatible with the Fourteenth Amendment, which requires that no state deny any person within its jurisdiction the equal protection of the laws of that state. In Cooper v. Aaron (1958) 358 U.S. 1, a decision directly concerned with discriminatory application of state law, the Supreme Court ruled:

'The Constitution created a government dedicated to equal

> justice under law. The Fourteenth Amendment embodies and emphasized that ideal. . . . The principles [thus embodied] and the obedience of the states to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.' Id. at 19-20.

"The Supreme Court has unequivocally affirmed federal jurisdiction to protect a litigant's rights under state law. The U.S. Supreme Court affirms in Fox River Paper Co. v. Railroad Commission (1927) 274 U.S. 651, 654: 'Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed depends upon state law.' This principle is reaffirmed by the High Court in Broad River Co. v. South Carolina (1930) 281 U.S. 537, 540:

> 'Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this court.'"

5.12 Plaintiff responds at 15 Record 332: "However, in Brinkerhoff-Faris Co. v. Hill (1930) 281 U.S. 673, 679-680 the U.S. Supreme Court ruled:

> '[A] transgression of the due process clause of the Four-

> teenth Amendment . . . is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid [citation] state statute. The federal guaranty of due process extends to state action through its legislative, executive or administrative branch of government.'"

5.13 Plaintiff responds at 15 Record 334-335:

> "Even though Plaintiff has suffered injuries directly traceable to ethnic gerrymandering, injuries which are within the intended zone of protection of the Fifteenth Amendment (because ethnic minorities must form coalitions if they are to have any chance of political success) and which will clearly be redressed by a favorable decision, Judge Karlton has invoked prudential limitations on jus tertii standing which are never applicable where fundamental rights are at stake. . . . Moreover, in Taylor v. Louisiana (1975) 419 U.S. 522, 526-527 the U. S. Supreme Court ruled:
>
> > 'Taylor was not a member of the excluded class; but there is no rule that claims such as Taylor represents may be made only by those whose defendants are members of the group excluded from jury service. . . . To exclude racial groups from jury service [is] at war with our basic concepts of a democratic society and a representative government.'

The underlying rationale for not applying the usual limitations on standing to issues where racial discrimination affects the institutions of government is explained in Rose v. Mitchell (1979) 443 U.S. 545, 555-556.

> 'Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice . . . . "The injury is not limited to the defendant -- there is injury . . . to the law as an institution . . . and to the democratic ideal reflected in the processes of our court." [Citation.]'

Obviously the 'basic concepts of a democratic society and a representative government' Taylor v. Louisiana supra which are 'reflected in the processes of our courts' Rose v. Mitchell supra must be reflected even more directly and clearly in the principles governing the procedures by which we elect our representatives."

5.14 Plaintiff responds at 6 Record 418-420:

"Laird v. Tatum simply affirms the general principle that rights are usually most effectively asserted by those owning them. There is nothing there which supports Judge Karlton's implicit notion that dilution of the voting power of ethnic minorities cannot injure the interests of others and thereby provide a basis for jus tertii standing.

"Indeed, ethnic gerrymandering

violates voting rights that are fundamental enough to support the invocation of jus tertii. (See 1 Record 174-188 for Plaintiff's documentation of ethnic gerrymandering in the contested districts.) Refusal to remedy the dilution of black and Hispanic voting power violates the 'extraordinary protection from the majoritarian political process' which groups such as blacks and Hispanics who have been 'subjected to a history of purposeful unequal treatment' or 'relegated to a position of political powerlessness' are entitled under San Antonio School District v. Rodriguez (1973) 411 U.S. 1, 28.

"The right to judicial relief of whites who are injured by discrimination against blacks is squarely affirmed by the Court in Walker v. Pointer (1969) 304 F. Supp. 56. The Walker court relies upon Barrows v. Jackson (1953) 346 U.S. 249, 257, which holds that where a litigant is injured by the denial of the fundamental rights of others 'the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which [otherwise] would be denied.' The only time a white's standing to seek relief from racial gerrymandering against non-whites has been challenged in a statewide redistricting case, the court adjudicated the racial gerrymandering claim. See Sincock v. Gately (1967) 262 F.Supp. 739, 803-804, 847.

"Plaintiff argued (at 7 Record

104) in support of his January 7, 1983 motion to reconsider Judge Karlton's exclusion of his ethnic gerrymandering claims:

> 'Far from having a trifling impact on Plaintiff's interests, the undermining of minority political rights will in the short run remove an essential element from the political coalition which Plaintiff supports and in the long run perhaps destroy our free society: "under our democratic system equality of representation is essential to the preservation of democracy itself." Brewer v. Gray (1956), Florida, 86 So.2d 799, 803.'

Since both elections to public office and the enactment of laws are based upon majority rule, even if an individual's own vote is unimpaired his political effectiveness is compromised by impairment of the votes of his political allies, and the effectiveness of the legislators he may help to elect is impaired if potential allies from other districts are replaced by foes because of gerrymandering of those districts. More specifically, the systematic exclusion of blacks from Republican-leaning legislative districts directly undermines the position of civil-rights-oriented Republicans such as Plaintiff within The G.O.P. (see 10 Record 269), and the fragmentation of minority communities to bolster the registration margins of Anglo Democrats reduces the number of Republican legislators

who are elected. (See 1 Record 175.) Thus political scientists recognize the common interest of Republicans and ethnic minorities in the drawing of legislative district boundaries.

"Racial discrimination which affects political rights must be nipped in the bud. The importance to everyone of checking the racial fragmentation of society is best illustrated by the famous statement of Pastor Niemoller, 'They came for the Jews but I did not protest because I was not a Jew. . . . When they came for me there was no one left to protest.' Once potential allies have had their votes minimized it may be too late to assemble an effective political coalition."

5.15 Plaintiff notes at 11 Record 86-87:

"Neither the opposition briefs nor Judge Karlton's statements at the June 11, 1982 hearing gave any indication that the partisan gerrymandering aspect of Plaintiff's case was not accepted as a justiciable issue. Plaintiff did not allege that partisan gerrymandering was unlawful in redistricting plans enacted by a state legislature, only that partisan gerrymandering was constitutionally unacceptable in court-ordered redistricting plans. At the June 11 hearing Judge Karlton asked counsel for the Assembly:

> 'Mr. Halliwell, I think, tried to argue that [it] is all right for the Assembly to have political motivation because Justice White observed

that's what redistricting is about. But the courts are held to a different standard, so that in an actual kind of way the court gets stuck with the Assembly's lawful political motivation but is held to a standard in which it may not have that motivation. And in a direct kind of way it gives the burden as well as the benefits if you will. What's your answer to that, sir?'

"Mr. Remcho, counsel for the Assembly, replied, 'I agree the court is held to a stricter standard and we will have to assume for purposes of this motion that in fact the Assembly plans were politically motivated . . . .' Hearing Transcript at 28.

"In summarizing his case later in the hearing Plaintiff said, 'Number nine [3 Record 388], I think we have gone into probably enough detail on this already, is that there are stricter standards for court --'

"Judge Karlton interrupted: That has been conceded by the Assembly.' Id. at 51."

5.16 Plaintiff responds at 89-91:

"Since Plaintiff had documented numerous instances wherein the contested districts departed from the Connor v. Finch (1977) 431 U.S. 407, 415 requirement that court-ordered legislative districts consist, wherever possible, of compact groupings of whole political subdivisions, Russo v. Vacin does not provide any support for Judge Karl-

ton's dismissal of Plaintiff's partisan gerrymandering claims. The syllabus of this decision notes:

> 'The Court of Appeals, Pell, Circuit Judge, held that complaint which alleged that elected representatives were improperly motivated in drawing new ward lines that minimized strength of political opponents in aldermanic elections but which did not allege that wards had disproportionate populations or bore indicia, such as lack of compactness, of some form of invidious discrimination, did not state claim upon which relief could be granted.' 528 F.2d at 28.

"Russo also rejects Judge Karlton's interpretation of Gaffney v. Cummings:

> 'The Court in Gaffney recognized that both political and census data would be used in drawing districts "to achieve the political or other ends of the state, its constituents, and its officeholders," and noted that when redistricting is done for political purposes it is not wholly exempt from judicial scrutiny. 412 U.S. at 754, 93 S.Ct. at 2332. We need not delineate in this opinion where the exemption from judicial scrutiny ends. It is sufficient for us to hold that a justiciable issue is not presented by a complaint which pleads that political considerations motivated the drawing of certain district

> lines but does not plead that the populations of the districts were unequal or that the districting was in any way irrational, e.g., the wards lacked compactness.' Id. at 30.

"Moreover, since the California Supreme Court adopted the redistricting plans mandated by Assembly v. Deukmejian on the Court's own authority, Russo provides no support for dismissal of Plaintiff's allegations of partisan gerrymandering in these districts, since Russo deals only with legislatively enacted plans.

> '[T]he present case merely alleges that elected representatives were improperly motivated in drawing new ward lines. The courts have repeatedly recognized that as long as legislative bodies draw electoral district lines, the political impact of their work will not be ignored by such bodies. While the courts should continue to try to protect voters from the misuse of electoral machinery, we do not propose to supplant legislative judgment where the only alleged misconduct is considering political factors in the redistricting process. This is not to say that circumstances could not be conceived where the actions of an elected body would be so egregious as to constitute a breach of public trust. This is not such a case.' Id. at 30."

5.17 Plaintiff responds at 11 Record 94-96:

"The instruction issued to the lower court by the Supreme Court in Connor v. Finch (at 422) that court-ordered plans should avoid 'unexplained departures from neutral guidelines' and the use of 'irregularly shaped districts when alternative plans exhibiting contiguity, compactness, and lower or acceptable population variances were at hand' can hardly be classified as dicta inasmuch as the Supreme Court indicated that the previous plan was unacceptable on account of failure to conform to these standards. While the High Court did state that the previous plan could not even satisfy population equality requirements, that was certainly not the only question considered by the Court. The Court did not make a finding of fact concerning the dilution of Negro voting strength because the neutral guidelines mandated by the Court precluded any such dilution in the new plan.

"While racial discrimination was indeed the focus of the Supreme Court's concern in Connor v. Finch, the Court's opinion did not single out potential racial discrimination as the reason for judicial circumspection in devising redistricting plans. The reason for the required circumspection is that courts lack 'the POLITICAL authoritativeness that the legislature can bring to the task' 431 U.S. at 415. Emphasis added. Moreover, 'in a manner free from ANY taint of arbitrariness or discrimination' obviously requires

the avoidance of all forms of invidious discrimination.

"Plaintiff has never asserted that the standards for redistricting plans ordered by federal district courts were automatically applicable to redistricting plans mandated by state supreme courts. Where a state court falls on the continuum between a state legislature and a federal district court will depend primarily on whether (1) the court is elected or appointed; (2) the state constitution or legislation assigns redistricting responsibilities to the court; (3) whether state law contains provision that may be fairly construed by the state court as 'significant state considerations' justifying departure from otherwise applicable standards for court-ordered plans.

"Even the Michigan Supreme Court, which is elected under party labels and has specific constitutional authority to redistrict the state in the event that the redistricting commission deadlocks, recognized that departures in its redistricting plan from federal-court plan guidelines had to be thoroughly justified (see Plaintiff's brief of December 6, 1983 at [10 Record] 194-200). Plaintiff's primary reason for assuming that court-ordered plans mandated by the California Supreme Court must be held to higher standards than a state legislature's plans is that Assembly v. Deukmejian at 30 Cal. 3d 667 held that the standards adopted by the U.S. Supreme Court for court-ordered plans were

applicable to the California Court's previous redistricting plans.

"There is no basis whatever for Judge Karlton's assertion that the California Supreme Court has the same authority over redistricting as the California Legislature. This notion is squarely rejected by the California Supreme Court in Assembly v. Deukmejian.

> 'Guided by a proper reluctance to enter into an area of public policy reserved for the people and their elected representatives, this court acts today within the most restricted boundaries consistent with its constitutional duties.' 30 Cal. 3d at 678.

"While the U.S. Supreme Court has specifically encouraged state courts to assume responsibility for redistricting when a state's political branches of government fail to properly discharge this responsibility, Maryland Committee v. Tawes (1964) 377 U.S. 656, and federal courts have been advised to give state courts an adequate opportunity to adopt redistricting plans before doing so themselves, Scott v. Germano (1965) 381 U.S. 407, the U.S. Supreme Court has also charged federal district courts with the responsibility of determining the validity of reapportionment plans adopted by 'appropriate agencies of the state . . . including its supreme court' and in the event no valid plan has been adopted the federal district court 'may enter such orders as it deems appropriate, including an order for a

valid reapportionment plan.' Scott v. Germano at 409."

5.18 Plaintiff responds at 11 Record 98-99:

"It is hard to imagine a type of district more unlike a state legislative or congressional district than the water improvement district involved in Jimenez. Furthermore, there is not the slightest suggestion of partisan gerrymandering in Jimenez. The only portion of the cited discourse by Judge Gee that relates at all to the result in Jimenez is an affirmation that political motivation by itself is not grounds for declaring legislation to be unconstitutional. As summarized by the West Retrieval Service the cited passage boils down to:

> 'Even assuming that statutory exclusion of urban areas from water district was for political reasons, such exclusion, with result that plaintiffs who resided in urban areas were excluded from water district electorate, did not constitute denial of plaintiff's constitutional rights.' 68 F.R.D. at 669.

The gross dissimilarity in subject matter is apparent also from West's classification of the citation under 'Waters and Water Courses Key 182' Id. Moreover, the dissimilarity between the partisan gerrymandering claims the dismissal of which this opinion is used to justify and the actual issue in Jimenez is apparent from Judge Gee's own statement of his holding: 'Plaintiffs' claim is

beyond our warrant, and their invitation to rewrite Gomillion -- and the Fifteenth Amendment -- to read 'urban' for 'race' or 'color' must be declined.' 68 F.R.D. at 675."

5.19 Plaintiff responds at 11 Record 107: "Plaintiff's authority for his Guaranty Clause claims includes explicit interpretations of the scope of the Guaranty Clause, Minor v. Happersett (1874) 88 U.S. 162, 176-177, and definitions of the essential ingredients of a republican form of government, Chisholm v. Georgia (1793) 2 U.S. 419, 456-457 and In re Duncan (1891) 139 U.S. 449, 461. The fact that a class of claims exists which are not cognizable under the Guaranty Clause, but suitable for adjudication under another portion of the Constitution, does not wipe out of existence the precedents where the U.S. Supreme Court has defined and applied the Guaranty Clause."

5.20 Plaintiff responds at 11 Record 102-104:
"The Guaranty Clause also protects against domestic violence, and it was just such an application that was involved in Luther v. Borden. Of course, Congress or the President must identify who are the rebels and who is the lawful government in order to put down an armed insurrection such as Door's Rebellion; but this does not mean that the first portion of the Guaranty Clause, which reads, 'The UNITED STATES shall guarantee to every state in this union a republican

form of government,' makes only the elected branches of the federal government competent to act when a state's political institutions have been abrogated by JUDICIAL ukase.

"Baker v. Carr (1962) 369 U.S. 186, 222 affirms the limited scope of Luther v. Borden:

> '[T]he only significance that Luther could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize in order to identify a state's lawful government.'

"In Highland Farms the Court ADJUDICATED THE GUARANTY CLAUSE CLAIM. The Court ruled:

> 'How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. Nothing in the distribution here attempted [delegation of authority over milk prices] supplies the basis for an exception. The statute is not a denial of a republican form of government.' 300 U.S. at 612.

The Court does continue in the next sentence, 'Anyway, the enforcement of that guarantee according to the settled doctrine, is for Congress, not the courts.' But the 'Anyway' which Judge Karlton leaves out obviously marks this passage as dicta. The settled doctrine mentioned is the settled doctrine of THAT ERA that courts should stay clear of issues involving the allocation of

political power. Cf. Colegrove v. Green (1946) 328 U.S. 549.

> "Baker v. Carr notes that: 'Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding [on the applicability of this doctrine] is itself a delicate exercise in constitutional interpretation, and is a responsibility of this court as ultimate interpreter of the Constitution.' 369 U.S. at 210-211.

The page in Baker cited by Judge Karlton continues, '[This] nonjusticiability has nothing to do with [these questions] touching upon matters of state governmental organization.' 369 U.S. at 218. Elrod v. Burns (1976) 427 U.S. 347, 352 notes: 'the political question doctrine has no applicability to the federal judiciary's relationship to the states.' Any notion that Baker v. Carr intended to label Guaranty Clause claims as non-justiciable without reference to the nature of the claim is dispelled by Reynolds v. Sims (1964) 377 U.S. 533, 582.

> 'As we stated in Baker v. Carr SOME questions raised under the Guaranty Clause are nonjusticiable, where "political" in nature and where there is a clear absence of judicially manageable standards.' Emphasis added."

5.21 Plaintiff responds at 15 Record 337-338:

"[I]n Baker at 210 the Court rules

out any political question exclusion in Halliwell v. Eu, since '[it is] not the federal judiciary's relationship which gives rise to the "political question."' Also, in Reynolds v. Sims (1964) 377 U.S. 533, 582 the court reaffirmed that only some Guaranty Clause claims are nonjusticiable: 'As we stated in Baker v. Carr, some questions raised under the Guaranty Clause are nonjusticiable, where "political" in nature and where there is a clear absence of judicially manageable standards.' Furthermore, as the court notes in Powell v. McCormack (1969) 395 U.S. 486:

> 'In deciding generally whether a claim is justiciable, a court must determine whether "the duty asserted can be judicially identified and its breach judicailly determined, and whether protection for the right asserted can be judicially molded." Baker v. Carr, supra, at 198.' Id. at 516-517.
>
> 'In Baker v. Carr, supra, we noted that political questions are not justiciable primarily because of the separation of powers within the Federal Government.' Id. at 518.

Finally, the notion that federal courts lack subject matter jurisdiction over any portion of the United States Constitution is directly contrary to Article III § 2(1): 'The judicial power shall extend to all cases, in law and equity, arising under this Constitution.' Marbury v. Madison (1803) 5 U.S.

137, 174, 177 notes: 'It cannot be presumed that any clause in the Constitution is intended to be without effect and . . . . It is emphatically the duty of the judicial department to say what the law is.'"

5.22 At the June 11, 1982 hearing Plaintiff argued that his main Guaranty Clause claim, the abrogation of referendum stay provisions, was also cognizable "[under] the First Amendment freedom to petition." Plaintiff stated, "I would argue that freedom of association covers political parties." Hearing Transcript at 11. Quoted at 11 Record 32.

5.23 Plaintiff explains in paragraph #21 of his August 23, 1982 affidavit (at 4 Record 310-311):

"In the same June 14th conversation Plaintiff informed the law clerk that he was withdrawing his stipulation regarding Assembly population figures because this stipulation had been based on incorrection information which had been supplied to him orally by counsel for the Assembly at the hearing. Plaintiff was informed that to revoke his stipulation it would be necessary to put his reasons in writing and serve this document on all parties; this was done on the same day. Plaintiff recognizes that in most circumstances the opposition must be given an opportunity to rebut the assertions of a litigant, but in dismissal proceedings Plaintiff's factual allegations must be presumed to be true. Plaintiff does not

object to being required to put in writing his reasons for revoking his stipulation regarding Assembly district populations; he does object to the implication of footnote 10 of the June 30 order that he has tried to take unfair advantage of the opposition in this matter. The detailed explanation of which Judge Karlton complains was considered essential by Plaintiff in order to maintain the credibility of any future stipulations which he may offer."

5.24 Plaintiff responds in paragraph #24 of his August 23, 1982 affidavit (at 4 Record 312):
"Had Judge Karlton ruled immediately after the June 11 hearing Plaintiff intended to ask for immediate reconsideration of any ruling in favor of dismissal based on the standing issue, since this issue was raised only by the Assembly and the Assembly had been allowed three weeks in which to prepare their dismissal motion, while Plaintiff was allowed only two days in which to research his response. By June 28 so much time had passed while Judge Karlton was reaching his decision that Judge Karlton's justification for postponing the hearing til after the primary was no longer valid, since it was becoming less and less feasible to undo the results of the primary. In this situation Plaintiff felt that further delay for a reconsideration based on more adequate information regarding the issue of standing in relation to this case would have

aggravated the problem of feasible remedy. Since all attempts at phone communication had failed it was impossible for Plaintiff to request permission of the Court to submit further written argument on this point. In these circumstances Plaintiff's supplemental memorandum on standing was not taking unfair advantage of the opposition but rectifying the imbalance in the record on this issue, an imbalance which had been caused by the opposition in conjunction with the court itself."

5.25 Plaintiff responds at 11 Record 117-118:

"It is certainly inappropriate for Judge Karlton to invoke the right of a party to argue their side of a dispute when he allows Plaintiff no such right in imposing his no-notice sua sponte dismissals without leave to amend. The invocation of Local Rule 113 is equally inappropriate, since the two-week response time originally agreed upon for Plaintiff is the minimum specified by that Rule.

"A court undoubtedly has the right to refuse to consider any argument which the court feels would prejudice the rights of opposing parties, but in this instance the real opposing party was obviously Judge Karlton himself, since it was only his sua sponte dismissals without leave to amend which posed any real threat to Plaintiff's case. Moreover, the court has no right, in the absence of a proper motion to strike, to delete anything from

the case record, most certainly not by oral instructions to court employees without any 'paper trail' indicating what was submitted and when it was rejected. If a judge were allowed to tamper with the case record in such a manner a litigant's right to appeal from the judge's decision would be wholly illusory, for there would be no way for the litigant to document the points which the lower court had refused to consider."

5.26 Plaintiff responds at 11 Record 114-115:

"There is not one instance on record of a federal judge's referring only part of a statewide redistricting case to a three-judge panel pursuant to 28 U.S.C. § 2284 (see 5 Record 365-376), and Plaintiff can find no example of such a partial referral under the much broader provisions of the now-repealed U.S.C. § 2281 involving challenges to any state legislation. In trying to support Judge Karlton's referral of a truncated version of Plaintiff's case Defendants cite (7 Record 206) Getty v. Reed (1977) 547 F.2d 971, but this case states:

> 'The function of the District Judge in whose court a cause of action seeking a three-judge court is brought is limited indeed. Basically it is to notify the Chief Judge of the Circuit Court of the pendency of the litigation and ask his designation of the other members of the court. He can and should, however, screen

> the pleading and dismiss it if 1) the District Court has no jurisdiction over the action [citations] or 2) the federal claims are 'WHOLLY insubstantial and obviously frivlous and without merit within the meaning of Goosby v. Osser, 409 U.S. 512 [citations].' Id. at 973. Emphasis added.

In Goosby v. Osser the Court notes:

> 'Claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial.' 409 U.S. at 518."

5.27 Plaintiff responds at 11 Record 119: "Plaintiff's inclusive brief was not a substitute for a short and plain statement but a documentation of allegations already set forth in such a statement. Judge Karlton's inability to discern the elements of Plaintiff's case is entirely his own fault, since Plaintiff went over his case outline [3 Record 384-389] item-by-item at the June 11, 1982 hearing and Judge Karlton acknowledged the need for no further clarification of each item ad seriatim."

5.28 Plaintiff notes at 11 Record 120: "Immediately after the June 11, 1982 hearing Plaintiff discovered that Chapman v. Meier (1975) 420 U. S. 1, 13-14 squarely affirmed that

challenges to statewide court-ordered redistricting plans required consideration by the same sort of three-judge panel as would be required if the challenged plan were adopted by a state legislature. Plaintiff included this citation (4 Record 14-15) in the memorandum on his other stipulation at the June 11 hearing WITH THE PRIOR APPROVAL OF JUDGE KARLTON'S LAW CLERK. Although it appears from the order of July 1 that Judge Karlton refused to consider this post-hearing citation, he did reach the same conclusion on the three-judge question as mandated by Chapman v. Meier."

5.29 Plaintiff responds at 11 Record 124: "It is obvious from this that Judge Karlton flatly denied Defendants' motions and then GRANTED HIS OWN MOTIONS. It is flatly contrary to the Federal Rules of Civil Procedure for a federal judge to skip the essential steps of notice to the parties and opportunity for parties to argue when a judge wishes to initiate his own motions. Moreover, for a judge to do such a thing in a case in which a non-lawyer is arguing his own case against EIGHT lawyers employed by various agencies of the state is surely outrageous."

5.30 Plaintiff responds at 16 Record 302-303:

"It is patently obvious that none of the claims which the District Court refuses to consider are constitutionally insubstantial under criteria mandated by the U.S. Su-

preme Court, as Plaintiff notes in Excerpts Section II. B., 'Standards for Evaluating Plaintiff's Claims':

> 'A claim is jurisdictionally insubstantial only if it "is so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit so as to not involve a federal controversy." Oneida Indian Nation v. County of Oneida (1974) 414 U.S. 661, 666-667 cited by Plaintiff at 5 Record 36, 6 Record 212.
>
> 'As Plaintiff has noted at 7 Record 148-149, the strict standards for dismissal of claims at the pleading stage have been wholly ignored by this court in its refusal to consider major aspects of Plaintiff's case:
>
> > "'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious' [citation]; 'wholly insubstantial,' [citation]; 'obviously frivolous,' [citation]; and 'obviously without merit' [citation]. The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally

insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281 [now § 2284]. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' [Citations.]" Goosby v. Osser (1973) 409 U.S. 512, 518.'"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Halliwell v. Eu C.A. 82-4453

Before Circuit Judge Eugene A. Wright

and Circuit Judge Procter Hug, Jr.

Item 6a (5 Record 114)

Filed September 28, 1982

This appeal is dismissed for lack of jurisdiction. An order dismissing a complaint, or part of a complaint, with leave to amend is not a final appealable order.[6.01] See Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (9th Cir. 1982).[6.02]

Plaintiff's Contextual Footnotes

6.01 Plaintiff responds at 11 Record 136-137:

> "Such a mechanistic application of the rules without any regard to the vital political rights at stake in the case at bar is absolutely contrary to the policy established by the United States Supreme Court.
>
> > 'Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.' Hormel v. Helvering (1941) 312 U.S. 552, 557.
>
> In Wesberry v. Sanders (1964) 376 U.S. 1, 6-7 the opinion notes that 'the power of courts to protect the constitutional rights of individuals' has been recognized at least since Marbury v. Madison 5 U.S. 137 in 1803 and that 'The right to vote is too important in our free society to be stripped of judicial protection.'"

6.02 Plaintiff responds at 17 Record 183-184:

> "However, in Scanlon supra the Court had held that 'the ruling was on a ground not curable by amendment [so] . . . the order is appealable.' 677 F.2d at 1272.
>
> "Under the terms of Judge Karlton's order of July 1, 1982 Scanlon clearly supported appealability, because Judge Karlton dismissed the great majority of Plain-

tiff's claims without leave to amend. Judge Karlton ruled, 'The motions to dismiss the complaint for failure to state a claim upon which relief may be granted, and for lack of subject matter jurisdiction are denied.' (4 Record 57.) But Judge Karlton also imposed a series of sua sponte dismissals without leave to amend:

> 'As I shall explain, these motions do not fatally pierce the plaintiff's lawsuit. They are, however, a useful tool with which to hack away the necrotic claims and attached allegations, arguments, innuendo, and creative legal theories which form the bulk of this massive, sprawling complaint. In this manner I hope to reveal whether there is any living tissue consisting of cognizable constitutional claims buried within this great flaccid carcass.' 4 Record 42-43.

Judge Karlton then proclaims that 'this approach inevitably eliminates the great majority of Plaintiff's claims and theories.' (4 Record 44-45.) Judge Karlton concludes by squarely placing his order within the realm of appealability defined by Scanlon supra when he rules: 'Finally, the plaintiff is directed not to assert any claims that have been discussed in this order and dismissed without leave to amend.' (4 Record 58.)

"Plaintiff's motion for reconsideration of the dismissal of his appeal quoted the above language

from Scanlon supra and argued:
'This clearly supports the appealability of the case at bar, since even the most cursory reading of Judge Karlton's order [of July 1, 1982] makes clear that he intended to finally dispose of the claims which he dismissed without leave to amend.' 5 Record 121."

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Halliwell v. Eu C.A. 82-4453

Before Judges Wright and Hug

Item # 6b (5 Record 197)

Filed October 22, 1982

Appellant's emergency request for reconsideration of the September 28, 1982 order dismissing this appeal is denied. To the extent that appellant's complaint in the district court should be construed as presenting a single broad claim for relief, the dismissal with leave to amend in certain respect was not appealable. See Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (9th Cir. 1982); Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975).[6.03] To the extent that appellant's complaint should be construed as presenting multiple claims for relief, the dismissal without leave to amend with respect to fewer than all claims was not appealable[6.04] in the absence of entry of judgment in accordance with Fed. R. Civ. P. 54(b).[6.05] No departure from these principles of appellate jurisdiction is warranted merely because the proceedings on the amended complaint are

now pending before a three-judge court. See Jacobs v. Tawes, 250 F.2d 611 (4th Cir. 1957).[6.06]

Plaintiff's Contextual Footnotes:

6.03 Plaintiff responds at 11 Record 145-146:

"Even when a court of appeals does not find a dismissal order appealable it must vacate unwarranted restrictions on plaintiff's right to amend his complaint:

'Plaintiffs have expressed concern at what they consider to be an unwarranted limitation on the type of amendment to the complaint which will be allowed by the district court. [Plaintffs may file] an amended complaint without prior limitation on the manner in which the complaint is to be amended.' Kozemchak v. Urkranian Orthodox Church (1971) 443 F.2d 401-402.

"Judges Wright and Hug do not say why they think Scanlon v. Atascadero State Hospital supports the dismissal of plaintiff's appeal except to cite Scott v. Eversole Mortuary, which is the authority on which Scanlon relies. However, like Scanlon, Scott also requires reversal of the restrictions imposed by Judge Karlton's dismissals without leave to amend:

'Even where amendment is not a matter of right "leave to amend shall be freely given when justice so requires." Fed.R.Civ.P. 15(a) . . . upon remand appellants should be allowed leave to amend. We therefore reverse the district court's dismissal of count

three insofar as it denies leave to amend.' Scott v. Eversole Mortuary (1975) 522 F.2d 1110, 1116."

6.04 Plaintiff responds at 6 Record 207-208:

"Rule 54(b) has always been applied in single-judge cases where a district judge has completed his evaluation of some aspects of a case but continues his consideration of other portions. In Halliwell v. Eu Judge Karlton had no authority to enter any judgment on the merits of any of Plaintiff's claims since he had found that Plaintiff's case was substantial enough to warrant the convening of a three-judge panel. In cases where there is a substantial challenge to the constitutionality of a statewide redistricting plan 28 U.S.C. § 2284(b)(3)(1976) explicitly states: 'A single judge shall not . . . enter judgment on the merits.' It is absurd for the Ninth Circuit to have refused to accept jurisdiction over Plaintiff's appeal 'in the absence of entry of judgment in accordance with Fed.R. Civ.P. 54(b)' when the judgment itself is outside the court's proper jurisdiction."

6.05 Plaintiff responds at 11 Record 147:

"Since Judge Karlton had adamantly refused to clarify the finality of the aspects of his order of July 1, 1982 which Plaintiff was then forced to appeal, the failure of the lower court to provide a Rule 54(b) certificate can

hardly serve as grounds for allowing the lower court's action to stand unchallenged until the ongoing elections process had made an appeal meaningless. The United States Supreme Court has squarely affirmed that notwithstanding the absence of a Rule 54(b) certificate the refusal of a lower court to adjudicate time-bound rights is a final disposition appealable under the 'collateral order' final disposition rule. In Moses H. Cone Memorial Hosp. v. Mercury Const. (1983) 103 S.Ct. 927, 935 the Supreme Court affirms that under the rule set forth in Cohen v. Beneficial Loan Corp. (1949) 337 U.S. 541 orders which 'conclusively determine the disputed question' by refusing to adjudicate it are final orders subject to interlocutory appeal: 'An order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits. For the same reason, this order would be entirely unreviewable if not appealed now.'"

6.06 Plaintiff responds to this holding:

"Even though it is cited by Judges Hug and Wright, there is nothing in Jacobs v. Tawes which suggests that the same standards of appellate review which are appropriate for single-judge cases should be used in cases where a three-judge tribunal is involved. In Jacobs the court of appeals ruled:

'We think that the order of dismissal was correct. It appears from the face of the

> complaint that the amount involved in the action is only $1,904.62 including penalties and interest; and where jurisdiction is based, as it must be here, not on some special statute, but upon the fact that the controversy arises under the Constitution or laws of the United States, the amount in controversy must exceed "the sum or value of $3,000, exclusive of interest and costs." 28 U.S.C. § 1331. There can be no question but that the jurisdictional amount of $3,000 is a prerequisite to jurisdiction in the District Court where a court of three judges is required for the hearing of the case as well as in other cases.' Id. at 613.

The fact that there is no difference between one-judge and three-judge courts with regard to the minimum amount in controversy under 28 U.S. C. § 1331 is totally irrelevant to Halliwell v. Eu.

"Judges Hug and Wright may be relaying on the following dictum from Jacobs v. Tawes:

> 'The court of three judges is not a different court from the District Court, but is the District Court composed of two additional judges sitting with the single District Judge before whom the application for injunction has been made. 28 U.S.C. § 2284 (1).' Id. at 614.

"However true such a general principle may have been in 1957, five years before the U.S. Supreme

Court handed down its landmark decision in Baker v. Carr (1962) 369 U.S. 186, the fact that Congress has since assigned jurisdiction over constitutional challenges to statewide redistricting plans to three-judge panels, established special expedited procedures for these panels, and abolished nearly all other types of cases where a three-judge district court is required (including the type involved in Jacobs v. Tawes) makes such a dictum completely inapplicable to Halliwell v. Eu.

"Moreover, even Jacobs recognizes that when a single judge commits a jurisdictional error in failing to refer a matter to a three-judge panel, 'the error can be corrected by appeal to the Court of Appeals without burdening the Supreme Court with a direct appeal.' 250 F. 2d at 615." (6 Record 215-217.)

Just such a jurisdictional usurpation by Judge Karlton of the proper responsibilities of a three-judge panel was a major point raised in Plaintiff's appeal to the Ninth Circuit. Therefore Plaintiff described the circumstances in Nixon v. Richey (1975) 513 F.2d 430, where Judge Richey faithfully followwed established procedural requirements but issued a ruling which

> "will prevent [Nixon] from presenting to the three-judge court substantial arguments in support of his challenge to the constitutional validity of the [disputed statute]," id. at 439.

Plaintiff then argued:

"In spite of the above circumstances which make Judge Richey's usurpation of the prerogatives of a three-judge court much less egregious than that committed by Judge Karlton, the Court of Appeals in Nixon v. Richey ruled:

> 'Three-judge business is for three judges, not just one, and we cannot accept the notion that a single judge can unilaterally narrow the ambit of a three-judge tribunal.' Id. at 445.

"In Halliwell v. Eu the central issue is whether the political party which controlled the Legislature, the Governor's Office and the California Supreme Court subverted the constitutional rights of the opposition party by evading the referendum and anti-gerrymandering provisions of the California Constitution. It would be difficult to imagine a more politically sensitive case, so the mandate of the Court of Appeals in Potter v. Meier (1972) 458 F.2d 585, 589 is especially applicable:

> 'Moreover, the very nature of the substantive attack in this type of case seems to us to emphasize the appropriateness of examination in the first instance by a statutory panel of three judges "to allow a more authoritative determination and less opportunity for individual predilection in sensitive and politically emotional areas" Swift & Co. v. Wickham (1965) 382 U.S. 111, 119 n.7.'

"The parallel with Potter v. Meier is especially close because of the way in which Judge Karlton dismissed most of Plaintiff's case without leave to amend. In Potter the opinion notes:

> 'The District Court made its ruling by virtue of its own independent examination of the issues presented. There is, to be sure, a duty on the part of a District Court to carefully scrutinize a three-judge application with a view toward ferreting out those requests that are bottomed upon plainly insubstantial constitutional claims, and to thereby avoid the needless assemblage of three busy judges. But in our view, a finding of insubstantiality should result only where the parties have addressed themselves to the issue and after all aspects of the issue have been thoroughly ventilated. At the very least, a plaintiff should be afforded the opportunity to demonstrate that he meets the substantiality test. Such an opportunity was not afforded the plaintiff in the instant case.' Id. at 589."
> (6 Record 186-187.)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Halliwell v. Eu C.A. 82-4453

Before Judges Wright and Hug

Item # 6c (5 Record 253)

Filed October 26, 1982

Appellant's emergency request for en banc reconsideration of the September 28, 1982 order dismissing this appeal is denied as untimely.[6.07] See Fed.R.App. P. 35(c),[6.08] 40(a).

Pursuant to Fed.R.App.P. 35(c) and 41(a), the mandate shall issue forthwith.

Plaintiff's Contextual Footnotes:

6.07 Plaintiff responds at 11 Record 150:

"As Wright & Miller note in Federal Practice and Procedures § 3986 at 473 n. 8:

'It is well established as to all types of cases -- state or federal, civil or criminal, appeals or certiorari cases -- that the prescribed period for petitioning for certiorari or noting an appeal to the Supreme Court starts with the entry of the lower court judgment; but if a timely rehearing petition is filed, that prescribed period is tolled and starts anew upon the entry of an order denying rehearing or otherwise finally disposing of the appeal. See, e.g., Department of Banking v. Pink, 1942, 63 S.Ct. 233, 317 U.S. 264, 87 L.Ed. 254.'

Judges Hug and Wright have nevertheless tolled the running of time for an en banc appeal from their dismissal of plaintiff's appeal without regard to Plaintiff's intervening timely request for reconsideration.

"Even though the Ninth Circuit has no published policy providing for such an unusual tolling of time, Judges Hug and Wright quarantined Plaintiff's en banc petition and prevented copies of it from reaching the active-service members of the Ninth Circuit."

6.08 Plaintiff notes at 11 Record 157-158:

> "A Supreme Court ruling handed down after the enactment of F.R.A.P. § 35 confirms that there are no exceptions to the rule that every active-service member of a court of appeals must receive a party's suggestion for en banc consideration. In Shenker v. Baltimore & Ohio Railroad (1963) 374 U.S. 1, 5 the opinion notes:
>
> > 'the rights of the litigant go no further than the right to know the administrative machinery that will be followed and the right to suggest that the en banc procedure be set in motion in his case. . . . Although every petition for rehearing is submitted to every member of the court, a judge is not required to enter a formal vote on the petition.'
>
> "The active-service judges of the Ninth Circuit might have denied Plaintiff's petition for en banc consideration on grounds of timeliness or for any other reason. But even if they agreed with Judges Hug and Wright on the untimeliness of Plaintiff's en banc petition a majority of the active-service judges still could have granted en banc consideration. See Sparks v. Duval Ranch Co. (1979) 604 F.2d 976, 979."

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Halliwell v. Eu C.A. 82-4453

Before Judges Wright and Hug

Item # 6d (6 Record 413-414)

Filed January 3, 1983

Appellant's December 15, 1982 petition for reinstatement of this appeal is denied.[6.09] In light of appellant's apparent unwillingness or inability to comprehend the limits on this court's jurisdiction noted in our prior orders,[6.10] a detailed explanation of the errors in appellant's latest petition would serve no useful purpose.[6.11] We have considered appellant's contentions,[6.12] however, and find them devoid of merit.

The appeal has been dismissed, the mandate has issued, and no further requests for reconsideration will be entertained. If appellant believes that review of this court's actions is necessary, his remedy lies in an application to the United States Supreme Court. Further attempts to obtain reconsideration by this court may result in the imposition of sanctions.[6.13]

The Clerk shall return to appellant the check tendered for the cost of return shipment of the documents previously submitted in this matter. If appellant does not arrange for the removal of the documents within 21 days of entry of this order, the Clerk shall dispose of them.

Plaintiff's Contextual Footnotes:

6.09 Plaintiff notes at 11 Record 296-299:

"On November 10, 1982 Plaintiff was notified by a deputy clerk of the Ninth Circuit that his pre-election petition for en banc consideration of his appeal had not been forwarded to the active-service judges of the Court of Appeals and that unless he promptly retrieved these materials they would be destroyed. Plaintiff's immediate response to this situation was simply to try to avoid destruction of these copies of the case record and supporting documents. However, Plaintiff also wrote a letter to Chief Judge Browning (6 Record 8-13) suggesting the possibility that

> 'The Ninth Circuit may on its own initiative decide that the jurisdictional issues relating to Plaintiff's appeal may be too important and too novel to have been relegated to a two-judge screening panel and request briefing from the parties regarding issues that may be referred to a regular three-judge appellate panel.' (6 Record 12.)

"Plaintiff's efforts to secure a moratorium on the disposal of his en banc request materials, which had been quarantined in the Ninth Circuit's San Francisco office by Judges Hug and Wright, were unsuccessful. (See 6 Record 83.) Plaintiff therefore made one more effort to secure action on the merits of his appeal before having the materials shipped back to him.

"In the letter of conveyance accompanying the briefs supporting reinstatement of his appeal (6 Record 85-273) Plaintiff wrote:

'The status conference for Halliwell v. Eu (E.Dist.California CIV.S. 82-147-LKK; C.A. 82-4453) which was held on December 6, 1982 did not produce the sort of expedited consideration that I believe is required by 28 U.S.C. § 2284(b)(2) and thus did not provide any reason for me to relinquish my efforts to secure en banc consideration of the materials I submitted for that purpose and Judges Hug and Wright refused to forward as required by FRAP 35(b). . . .

'I continue to hope that there is some way other than pressing my request for en banc consideration to secure a more detailed ruling on my case than the two perfunctory orders that have been issued thus far. Neither the order of September 28, 1982 nor its reaffirmation on October 22, 1982 gives any indication why the pragmatic finality rule of Brown Shoe Co. v. United States (1962) 370 U.S. 303, 306 is not applicable to my case. Without some indication of how the Ninth Circuit reasons its way around this apparently controlling precedent there is no way for me to frame an effective appeal to the Supreme Court as Mr.

> Fisher's letter suggests.' (6 Record 81.)

"Because Judges Hug and Wright had not applied any of the standards of appealability mandated by the U. S. Supreme Court in their dismissal orders, Plaintiff felt obliged to apply all of the major dimensions of appealability to the circumstances of his case. However, all Plaintiff's appeal proposed was simply the enforcement of a clear-cut jurisdictional statute. Plaintiff's summary on the cover page of his appeal states:

> '1) Plaintiff-appellant seeks reinstatement of his prior appeal. 2) This appeal involves the invasion of the province of a three-judge court by a single judge. 3) Rectifying this jurisdictional usurpation is fundamental to the further conduct of the case.
>
> 'The refusal of the judge who committed the usurpation being appealed to proceed with aspects of the case not being appealed unless Plaintiff relinquished his prior appeal has delayed this petition for reinstatement. Events which have transpired since the Ninth Circuit's prior refusal to accept jurisdiction over Plaintiff's appeal make appellate review a matter of continuing urgency.' (6 Record 127.)

The conclusion of Plaintiff's plea for reinstatement of his appeal states:

> 'All Plaintiff seeks now from the Ninth Circuit, all he has ever sought during the

past 4½ months of trying to get the Ninth Circuit to exercise its lawful jurisdiction, is an order vacating the improper restrictions of Judge Karlton's order of June 30 and a remand to the required three-judge panel for expedited proceedings as provided by 28 U. S.C. § 2284(b)(2).' (6 Record 222.)"

6.10 Plaintiff notes at 16 Record 362:

"After the order of October 22 the District Court finally held a hearing but still refused to rule on the merits of any of Plaintiff's claims. Plaintiff therefore petitioned (6 Record 127-223) the Ninth Circuit to enforce the expedited adjudication requirements of 28 U. S.C. § 2284. Plaintiff argued in the conclusion of this petition:

'Rule 1 of Federal Civil Procedures provides that the rules be interpreted so as to facilitate the just, speedy, and inexpensive determination of every action. Never is this rule so vital as in elections cases, since slowing, stopping or repeating the elections process will almost always produce serious inequities. Statewide redistricting cases, under explicit mandate from Congress, require that hearings shall be given precedence and held on the earliest practicable day. If a litigant seeks to have these rights enforced after many months of delaying tactics by the oppo-

sition and by the judge, how on earth can a court of appeals refuse jurisdiction over an appeal regarding the delay on the grounds that there has been no final disposition in the case?' Emphasis in original."

6.11 Plaintiff responds at 11 Record 300-302:

"Plaintiff-appellant's ability to seek review of the action of the Ninth Circuit in the United States Supreme Court is severely handicapped by the consistent refusal of Judges Hug and Wright to address the facts of this case. As Justice Brandeis notes for the Court in Virginian Railway Co. v. United States (1926) 272 U.S. 658,

'The suit was of a character deemed by Congress of such importance that it had made special provision for both adequate and speedy consideration.' Id. at 674.

'In view of the importance of the litigation, we interpret the absence of an opinion as tantamount to a declaration that upon careful scrutiny of the record the questions presented for judicial determination appeared to be simple, or, at all events, that the case did not involve the determination of any question of law which was novel or as to which there was, or could be, reasonable doubt.' Id. at 674.

'Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court.' Id. at 675.

'The failure to accompany the decree by an opinion may thus deprive litigants of the means of exercising a sound judgment on the propriety of an appeal; and the appellate court, being without knowledge of the grounds of the decision below, is denied an important aid in the consideration of the case, and will ordinarily be subjected to much unnecessary labor.' Id. at 675.

"The principles enunciated in Virginian Railway apply with even greater force when, as in Halliwell v. Eu, the appellant is a non-attorney facing a battery of eight lawyers employed by the Secretary of State, the Assembly and the Senate of California."

6.12 Plaintiff notes at 17 Record 182:

"Prior to the 1982 elections Plaintiff repeatedly urged the District Court to hold a hearing on the merits of his claims and heed the mandate of Greenberg v. Bolger (1980) 497 F.Supp. 756, 772:

'Elections cases require courts to be particularly careful to expedite disposition so that excessive procedural

niceties do not result in delays making the relief useless in an upcoming election.' 4 Record 323, 5 Record 159."

6.13 Plaintiff responds at 17 Record 187:

"When the Ninth Circuit is operating on the record by means of published opinions, the standard which defines the proper treatment of pro se litigants is the one quoted in United States v. Hough (1957) 157 F.Supp. 771, 774-775:

'Where the petitioner appears in propria person, as was observed by Judge Barnes of the Court of Appeals of the 9th Circuit, "the court itself undertakes to assure the litigant that no meritorious case be lost because of a lack of legal skill. Briefs are scanned with unjaundiced eyes and technical compliance with the Rules of Court is not stringently enforced. The dominant theme is liberality." Hoffman v. United States, 9 Cir., 244 F.2d 378, 379.'"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Circuit Judge Anthony M. Kenn[illegible]y, District Judge Lawrence K. Karlton, and District Judge Raul A. Ramirez

Item # 7 (5 Record 111-112)

Filed August 31, 1982

It appears that on August 9, 1982, the plaintiff in the above-captioned case filed a Notice of Appeal in this action.[7.01] It further appears that by doing so, the plaintiff may have divested this court of jurisdiction over the instant case during the pendency of that appeal.[7.02] Accordingly, motions now pending before this court -- including the plaintiff's motion for reconsideration and the defendant/intervenor's motion to strike or dismiss -- will not be considered by this court until the Court of Appeals disposes of the matters now before that court.[7.03] The hearing previously scheduled for September 7, 1982, on the defendant/intervenor's motion is hereby vacated. Upon disposition of the appeal, this court will schedule an expedited Status Conference to determine the most expeditious manner in which to proceed with this litigation.

IT IS SO ORDERED.

/s/ Anthony M. Kennedy

/s/ Lawrence K. Karlton

/s/ Raul A. Ramirez

Dated: August 25, 1982

Plaintiff's Contextual Footnotes:

7.01 Plaintiff affirms in his August 23, 1982 affidavit:

> "On July 12, 1982 Plaintiff filed his Second Amended Complaint, prepared according to the limitations set forth in the order of June 30. Plaintiff simultaneously filed a plea for reconsideration of the restrictive terms of the June 30 order. [See 4 Record 77-93.]
>
> "On July 23, 1982 Plaintiff . . . called Judge Karlton's law clerk seeking clarification of [the procedure for reconsideration]. . . . Plaintiff left a message [including] . . . a statement of his intent to file a contingency appeal if he had not heard before the 30-day appeal deadline whether the dismissals without leave to amend in the order of June 30 were intended as final dispositions." (4 Record 313-314.)
>
> "On August 6, 1982 Plaintiff . . . . again sought clarification from the Court's law clerk . . . . about the status of Plaintiff's request for reconsideration of the restrictions in the Court's order of June 30. [The law clerk] made it quite clear that any procedural clarification would have to come in the form of a written statement from Judge Karlton." (4 Record 314-315.)
>
> "On August 9, 1982 Plaintiff received notification from the Ninth Circuit that his appeal 'if reconsideration is not granted' was being treated as a notice of appeal. Any questions that Plaintiff might have were referred to the district

court. . . .

"Plaintiff then called Judge Karlton's secretary . . . . [seeking] information concerning the course of future proceedings.

"[The law clerk] called later on the same afternoon, and Plaintiff asked whether the dismissals without leave to amend in the order of June 30 were intended as final dispositions. [The law clerk] said that the order of June 30 meant what it said and referred Plaintiff to Wright and Miller's Federal Practice and Procedure. [The law clerk] then stated that the primary purpose of his call was to inform Plaintiff that effective immediately Plaintiff was permanently enjoined from contacting Judge Karlton's secretary or either of his law clerks for any reason whatsoever." (4 Record 315-316.)

7.02 Plaintiff responds at 16 Record 360: "This refusal to act was contrary to established practice as noted by Professor Moore in 9 Federal Practice § 203.11 at 3-54, 3-55:

> 'The filing of a timely and effective notice of appeal divests the district court of jurisdiction only with respect to the judgment brought up for review by the appeal. . . . But where an appeal is taken from a judgment which does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters not involved in the appeal.'"

7.03 Plaintiff protests this refusal to act at 11 Record 134-135:

"THUS, AFTER MORE THAN A MONTH OF FUTILE EFFORTS BY PLAINTIFF TO DETERMINE WHETHER THE THREE-JUDGE PANEL WOULD CONSIDER HIS MOTION FOR RECONSIDERATION, the panel came forth with an order refusing to consider this motion on the grounds that Plaintiff's appeal had deprived the panel of jurisdiction to do so. Yet Plaintiff had explicitly stated in his notice of appeal:

> 'I would prefer that the three-judge panel consider this appeal as a request for reconsideration.' (4 Record 212.)

Moreover, prior to the panel's order relinquishing jurisdiction, Plaintiff had informed the Court:

> 'This appeal was to take effect only if the dismissals without leave to amend had been docketed as final judgments. Two conversations with the law clerk in charge of this case produced no information on the finality of the crucial aspects of the June 30 order other than the statement, "The order speaks for itself."' (4 Record 322.)

"Considering the fact that Plaintiff is a non-lawyer conducting his own case, using Plaintiff's notice of appeal to defeat the clear intent of that appeal is at best a retrogression to the rigid formalism of a bygone era."

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judges Kennedy, Karlton and Ramirez

Item # 8 (5 Record 186-187)

Filed October 19, 1982

On October 14, 1982 the plaintiff filed a document with this court entitled "Request for Immediate Hearing." The plaintiff's request apparently is predicated on the notion that, pursuant to the Ninth Circuit's dismissal of the plaintiff's appeal, this court again has jurisdiction over this case. It also appears, however, that the plaintiff has filed a timely petition for reconsideration with the Court of Appeals, and thus stayed the issuance of the mandate by that court.[8.01] See, Fed.R.App.P. 41 (a). Finally, it appears that as a result of the plaintiff's activities, this court remains divested of jurisdiction until the Ninth Circuit has finally disposed of the appeal. See, In re Thorp, 655 F.2d 997, 998 (9th Cir. 1981). While this court is prepared to act promptly and expeditiously when it has regained jurisdiction over the lawsuit, it is not

willing to act at all when, by all appearances, it lacks jurisdiction. The plaintiff's request for an immediate hearing is therefore denied.[8.02]

IT IS SO ORDERED.

/s/ Kennedy, J.

/s/ Ramirez, J.

/s/ Karlton, J.

Dated: October 18, 1982

Plaintiff's Contextual Footnotes:

8.01 Plaintiff explains these filings at 11 Record 138-139:

"On October 4, 1982, having no other option to secure action before the general election, Plaintiff requested IMMEDIATE EMERGENCY reconsideration (5 Record 117-121) by Judges Wright and Hug of their dismissal of his appeal. This request for reconsideration sought to focus attention on the special status accorded statewide redistricting cases under 28 U.S.C. § 2284 and on the fact that the only case cited in support of dismissing Plaintiff's appeal had, in much less pressing circumstances, held, 'The order is appealable.' Scanlon v. Atascadero State Hospital (1982) 677 F.2d 1271, 1272.

"Since senate district misnumbering had caused elections to be held PREMATURELY in some districts, it was entirely feasible to halt such elections on October 11, 1982, and to have done so would have saved most of the expenditure of funds and much of the volunteer effort being expended in these campaigns. Plaintiff sought an immediate hearing to resolve this aspect of the case, noting:

> 'The three-judge panel convened by Judge Karlton's order of June 30 is authorized to proceed to consider the matter of senate misnumbering, the most clearcut issue in Plaintiff's second amended complaint, since this issue has nothing to do with his

appeal. The panel should do so forthwith for the following reasons.

'A. The three-judge court is faced with a clearcut constitutional issue which can readily be resolved before the November 2, 1982 election. Plaintiff's proposed remedy in this area still is completely feasible, i.e., to enjoin the elections now scheduled which will provide residents of 6 SD and 32 SD with double representation in the Senate.

'B. Plaintiff's standing on this issue has been attacked only with regard to his right to seek reinstatement of elections in the two districts where they have been cancelled.

'C. The panel has been fully briefed on the issue of senate district misnumbering.

'D. The panel has delayed consideration of this issue because Judge Karlton dismissed without leave to amend unrelated claims in Plaintiff's comprehensive complaint.'
(5 Record 124.)"

8.02 Plaintiff notes his response to this order at 11 Record 142-143:

"Plaintiff immediately filed a request (5 Record 189-195) that the denial of a hearing on senate district misnumbering be reconsidered. This reconsideration request pointed out that the authorities cited by In re Thorp affirmed that jurisdiction is lost by the court conducting a case during an appeal ONLY over

the aspects of the case involved in the appeal. This same position has been taken by the United States Supreme Court.

> 'The filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.' Griggs v. Provident Consumer Discount Co. (1982) 103 S.Ct. 400, 402. Emphasis added."

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judges Kennedy, Karlton and Ramirez

Item # 9 (5 Record 198-199)

Filed October 22, 1982

Plaintiff MICHAEL HALLIWELL has brought on what appears to be a request for a temporary restraining order.[9.01] As best this court can ascertain, the plaintiff may now be seeking an order restraining certain officials of the State of California from holding a general election on November 2, 1982.

The court previously indicated that it would not take any action in regard to this case until the Ninth Circuit finally disposed of the plaintiff's appeal. While this generally is the more prudent course to follow when the district court has some doubt as to its jurisdiction, the court may nonetheless act when, as is apparently true in this case, the notice of appeal seeks review of a non-appealable order. Ruby v. Secretary of United States Navy, 365 F. 2d 385 (9th Cir.), cert. denied, 386 U. S. 1011 (1967); see 9 J. Moore & B. Ward,

Moore's Federal Practice, ¶ 203.11, p. 3-51 n. 28. In view of the gravity of the claims made by the plaintiff, the significance of the relief he seeks, the imminence of the impending election, and the ruling of the Ninth Circuit dismissing the appeal for lack of jurisdiction, it now appears to the court proper to hold an immediate hearing on the plaintiff's request. The court will attempt to determine at that time, inter alia, the extent of its present jurisdiction over this case.

THEREFORE, the court hereby directs that a hearing be held before this court on October 27, 1982, at 1:30 p.m. on plaintiff's request for a temporary restraining order.[9.02]

IT IS SO ORDERED.[9.03]

/s/ Kennedy, J.

/s/ Ramirez, J.

/s/ Karlton, J.

Dated:
October 22, 1982

Plaintiff's Contextual Footnotes:

9.01 Plaintiff discusses this motion at 11 Record 159:

> "On October 20, 1982 Plaintiff renewed his motion to restrain the conduct of congressional and state legislative elections using the districts set forth in A.B. 301, S. B. 99 and A.B. 300 which had been ignored by Judge Karlton ever since Plaintiff put forward this proposal in his opening complaint (1 Record 17) and has also been ignored by the three-judge panel since the challenge to these same districts was renewed on equal protection grounds (4 Record 67-71), in Plaintiff's complaint filed pursuant to Judge Karlton's order of July 1, 1982. However, in this instance Plaintiff noted:
>
> '1) Written opinion acting upon Plaintiff's request for a restraining order regarding conduct of the November 2 elections is needed IMMEDIATELY for purpose of appeal to the Supreme Court and must be transmitted to Justice Rehnquist as quickly as possible.
>
> 2) If the three-judge panel deems it inappropriate to act upon this request, written statement of reasons why is needed IMMEDIATELY.' (5 Record 179.)"

9.02 At the October 27, 1982 hearing the Secretary of State presented a convincing demonstration that it was

too late to interfere with the general election scheduled to take place five days later. Plaintiff therefore revised his proposed remedy, as this passage from the hearing transcript (quoted at 11 Record 230-231) relates:

"What I propose is this: I have in the record three complete model plans, and I have evaluated their partisan profiles along with the partisan profiles of existing districts [5 Record 287-296] in attempting to prove [partisan] gerrymandering. Now this could be put to one other use, and that is simply this: That the elections go forth as scheduled, but before the election the Court rules [for instance], as per this demonstration, your district has [been] wrongfully and unconstitutionally gerrymandered to the extent of a 2.5% unfair margin for you. [So] unless you get 52.5 percent of the vote compared to your opponent, you are going to have to have a special election to win that seat. What this will do is . . . save the 90 percent of elections [where defects in districts] haven't made any difference; in gerrymandering you only [change] a few seats.

"The elections can go on. The candidates will know -- and this is crucial -- they've got to know this before the election otherwise it is not fair. You start fussing around with remedies after you know who won and who lost and there's no way we're not losers. Every judge gets on the bench because some senator or at least a president thought he

was worth while. Some of them were college friends like Felix Frankfurter, but most [are] people they knew in their campaign. [You wouldn't find] enough judges [for] this [court] in this whole country if you made a house-to-house [or] a bench-to-bench search [who are] just politically neutral. That's why I want you to hand this down before the election."

9.03 The Court declined to rule on Plaintiff's revised proposal or on the underlying merits. Speaking for the Court, Judge Karlton announced from the bench:

"The Court begins preliminary by informing the parties that it declines the invitation of the Assembly, joined in by the Plaintiff, to treat this motion [as] one on the ultimate merits pursuant to the Federal Rules of Procedure 65(a)(2).

"We thus return to the question of the appropriate standards for a TRO, which appear to be essentially the same as those for a preliminary injunction.

"The Supreme Court has repeatedly emphasized that where interim relief is sought in voting rights cases, 'Any relief accorded is to be fashioned in the light of well-known principles of equity.' Baker versus Carr, 369 U.S. 186, at 250, Douglas, J., concurring; quoted in Reynolds versus Sims, 377 U.S. 533, at 541; accord, Mahan versus Howell, 410 U.S. 315, at 334-335. As will be explained more fully, it follows that the question of whether any

relief should be granted is also to be determined under prevailing standards for the granting of equitable relief.

"The Ninth Circuit has stated on a number of occasions that a plaintiff seeking injunctive relief must show either '(1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in his favor.' Los Angeles Memorial Coliseum Commission versus NFL, 634 F.2d 1197, at 1201; William Inglis & Sons versus ITT Continental Baking, 526 F.2d 86, at 88.

"It is clear that these are not separate tests but outreaches of a single continuum. This standard is particularly well-suited to such requests in voting rights cases.

"We are not satisfied that the State and the State parties have refuted all of the challenges to the reapportionment plan. Indeed, if I may depart from our brief statement for a moment, I personally have some substantial questions. Nonetheless, the initial burden on the plaintiff is to satisfy that there is a substantial chance of prevailing on the merits. Especially in view of the California Supreme Court's upholding of the referendum, that issue is in doubt.

"Moreover, there are significant questions of standing and indeed on the merits themselves. As to the hardship, it seems self-evident. All of the necessary

machinery for the election is now in place; an affidavit submitted by the Secretary of State's Deputy in of elections estimates that if the state is required to hold a special election in the disputed races it will cost the state around 12 million dollars. Moreover, it cannot be doubted that the cancellation of the impending congressional and legislative elections and the scheduling of a special election would result in the loss of millions of dollars to the candidates for those offices and their supporters.

"The most significant hardship to be suffered, however, cannot be measured in dollars. By delaying the elections, this Court would greatly interfere with the political participation and expression rights of candidates, supporters, and voters alike. It seems likely that the cancellation of some part of the general election at this late date would create sufficient confusion as to discourage many voters from going to the polls at all. Similarly, at this time it can be readily inferred from experience that if a later special election is held in the disputed contests, the voter turnout will be extremely low. This latter consideration in itself led at least one court to refuse to enjoin an election pursuant to a plan that the court had already held to be unconstitutional. Cosner versus Dalton, 522 Fed.Supp. 350 at 363-64. Certainly to the extent to which public policy favors a strong and representative voter turnout,

the proposed remedy runs strongly contrary to the public interest.

"The courts have seldom been willing to enjoin elections at a date so near to the opening of the polls. Since Reynolds versus Sims, there have been a host of cases in which courts have found apportionment plans to be clearly offensive to the Constitution, and yet have allowed impending elections to take place under those plans. See Kilgarlin versus Hill, 386 U.S. 120 at 121; Cosner versus Dalton, 522 F. Supp. 350; Rodgers versus County Court of Augustine, 483 F.Supp. at 779, McCarthy versus Noel, 420 Fed. Supp. 799 at 804-805; and Dulcan versus Martin 64 F.R.D. 327.

"While plaintiff's sincerity cannot be doubted, plaintiff's hardship has not been demonstrated in light of his residency in an apparently over-represented district.

"For these reasons the motion for a temporary restraining order or for injunctive relief is denied. So as not to delay the plaintiff, this order is now directed to be entered forthwith.

"In the event that any counsel desires or party desires a copy of the transcript which will represent the findings of this Court, they are to request the same of the reporter who is ordered to directly prepare same.

"The Court will now stand in recess."

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judges Kennedy, Karlton and Ramirez

Item #10 (5 Record 477-485)

Filed November 1, 1982

On November 1, 1982, plaintiff Michael Halliwell brought on this motion for a "Temporary Injunction" in which he requests that this court enjoin the defendant California Secretary of State from certifying the results of elections to be held on November 2, 1982, for California's congressional and state legislative representatives. For reasons which shall be summarized briefly below, the court declines to hear oral argument on this request and by this order denies the plaintiff's motion.

The plaintiff filed the instant lawsuit on February 19, 1982. The underlying facts of the case are discussed in detail in Judge Karlton's order dismissing the First Amended Complaint, filed July 1, 1982. The gist of the plaintiff's claim is a challenge to the constitutionality of the interim congressional[10.01] and legislative apportion-

ment plans adopted for purposes of the impending elections by the California Supreme Court in Assembly v. Deukmejian, 30 Cal. 3d 638 (1982, appeal dismissed and cert. denied sub. nom. Republican National Committee v. Burton, ___ U.S. ___, 50 U.S.L.W. 3857 (April 27, 1982).[10.02]

Neither his original complaint nor his subsequent amended complaints has been altogether clear about the precise nature of the relief for which the plaintiff prays. It appears, however, that the plaintiff seeks a judgment permanently enjoining the state from employing the apportionment plans adopted by the California Supreme Court, and compelling the state to utilize certain other apportionment plans which the plaintiff feels are more consistent with the requirements of the United States Constitution. Although, as noted above, the action was

filed in February of this year, the plaintiff did not move for an order enjoining the November 2 elections until October 22, 1982. The court held a hearing on the plaintiff's motion on October 27, 1982, at which time it denied the motion. In order to facilitate any appeals from its order, the court announced its ruling from the bench and read into the record its reasons for denying the motion and citations to the case authorities supporting that ruling.[10.03]

In this motion the plaintiff seeks a somewhat different form of relief from that requested in the motion previously denied by the court.[10.04] Allegedly on the basis of advice given him by a law clerk to Mr. Justice Rehnquist, the plaintiff now limits his request to an order enjoining the certification of results in the disputed elections.[10.05]

The plaintiff has not requested a hearing before the court on this new motion; rather he asks for private, ex parte conferences with each of the three judges considering his motion.[10.06] Especially in light of the extraordinary nature of the relief he seeks, the plaintiff's request for private conferences with the court seems altogether inappropriate. Moreover, it appears that the issues raised by the plaintiff's present motion are substantially identical to those already considered and ruled upon by the court on October 27, 1982.[10.07] Because it concludes that further oral argument as to these matters would be a disservice to all parties involved and would not aid the court in disposing of the motion now before it, the court hereby elects not to hold another hearing, but rather to take the motion under advisement based upon the earlier

arguments and the briefs submitted. E.D. Cal. Rule 113(g); see Morrow v. Topping, 437 F.2d 155, 156 (9th Cir. 1971).

The Supreme Court has repeatedly emphasized that where, as here, interim relief is sought in voting rights cases, "any relief accorded [is to] be fashioned in the light of well known principles of equity." Baker v. Carr, 369 U.S. 186, 250 (1962) (Douglas, J., concurring), quoted in Reynolds v. Sims, 377 U.S. 533, 541 (1964), accord, Mahan v. Howell, 410 U.S. 315, 334-35 (1973). The Ninth Circuit has adopted the following standard for evaluating requests for interim equitable relief: the party seeking relief must show "either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and that the balance of hardships tips sharply in [his] favor. These are not

separate tests, but the outer reaches "of a single continuum." Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1200-01 (9th Cir. 1980) (citations omitted). This standard is particularly well suited to cases involving challenges to electoral apportionment plans; in this case, the plaintiff has failed to satisfy the standard at either end of the "continuum."[10.08]

The claims asserted in the plaintiff's Second Amended Complaint essentially derive from the "one person, one vote" doctrine enunciated in Baker v. Carr, supra, Reynolds v. Sims, supra, and their progeny. The plaintiff alleges that the plans adopted for the congressional and state assembly elections are comprised of electoral districts so disparate in size as impermissibly to dilute the right of equal representation

guaranteed by the Equal Protection Clause of the fourteenth amendment. In addition, the plaintiff alleges that the plan adopted for the state senate elections entails a renumbering of legislative districts that will result in some voters enjoying "double representation" in that body during the next two years and a consequent dilution of his voice in the legislative process. According to the plaintiff, this also violates the Equal Protection Clause.

No party has intervened as a defendant in this action specifically to represent the interests of California's congressional delegation; thus the only information now before the court regarding disparities in the congressional apportionment plan is that contained within the plaintiff's complaint and moving papers. Using the method employed by the Supreme Court (see, e.g., Mahan v.

Howell, 410 U.S. at 319), the court calculates that the maximum percentage deviation in these districts at 1.32%.

The court first notes that the disparities alleged by the plaintiff in this plan do not approach the level of egregious malapportionment present in other plans condemned by the Supreme Court; indeed, if there is any point at which deviations are sufficiently de minimus as to preclude constitutional challenge (see, Swann v. Adams, 385 U.S. 440, 447 (1967)), this plan may well be permissible on that ground. The court has taught, however, that in drawing congressional districts, a state must "make a good faith effort to achieve precise mathematical equality." Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969); see also Daggett v. Kimmelman, 535 F.Supp. 978 (D.N.J.), probable jurisdiction noted, ___ U.S. ___, 102 S.Ct.

2955 (1982). The record before this court is not now sufficient for this court to make any intelligent determination as to whether that standard was met. In this regard, though, the court notes that the challenged plan was adopted for this election only by the California Supreme Court, and that in doing so that court concluded that it was far and away the most satisfactory plan available in terms of compliance with the one person, one vote mandate. Assembly v. Deukmejian, 30 Cal.3d at 674. At least at this stage in the proceedings, we must give some deference to the finding of the California Supreme Court. Thus we cannot say that the plaintiff now enjoys a substantial chance of succeeding on the merits of his challenge to the congressional districting plan.[10.09]

The plaintiff's claims regarding the apportionment plan for the State

Assembly are yet more dubious. The uncontradicted evidence presented by the Assembly (as defendant in intervention) is that the maximum percentage deviation under that plan is 3.92%.[10.10] The Supreme Court has held that a maximum deviation of less than 8% in state legislative districts was insufficient to state a prima facie claim of violation of the Equal Protection Clause. Gaffney v. Cummings, 412 U.S. 735, 743 (1973). Plainly, the plaintiff has not made out such a prima facie case.[10.11]

The court is far more impressed with the plaintiff's argument that the renumbering of state senate districts will result in certain voters having twice as much representation as he enjoys until new elections are held in 1984. Once again, however, the permissibility of that plan turns on whether the California Supreme Court acted in good faith

in adopting it, and whether the deviation was related to some legitimate state need. Mahan v. Howell, 410 U.S. 315. It is simply not possible for this court now to test the California court's conclusion that the plan had to be adopted in order best to satisfy the United State Constitution without disrupting the impending elections.[10.12] Assembly v. Deukmejian, supra. Finally, we note that the only cases cited to us in which federal courts have considered such challenges to the renumbering of legislative districts have concluded that such claims fail "to rise to constitutional magnitude." Mader v. Crowell, 498 F.Supp. 226, 231 (M.D. Tenn. 1980); see also Ferrell v. Oklahoma, 339 F.Supp. 73, 82 (W.D. Okla. 1972), aff'd mem. sub. nom. Ferrell v. Hall, 406 U.S. 939 (1972).[10.13] In summary, we can say that at best the plaintiff has raised

some serious issues going to the merits; we certainly cannot conclude that he has demonstrated that it is likely that he will prevail.

Going to the other prong of the test, it is clear that the hardships tip decidedly in favor of the defendants. The plaintiff may well have a cognizable claim on the basis that the dilution of other voters' rights is a controversy which vitally concerns him as a California citizen. See, Swann v. Adams, 385 U.S. 440, 443 (1967). The fact remains, however, that according to his own allegations the plaintiff is a resident of congressional and assembly districts that enjoy over representation in those bodies under the challenged plans. To that degree, the direct injury that the plaintiff will suffer if the election results are certified on November 2, 1982, is not substantial.[10.14]

On the other hand, the remedy that the plaintiff seeks would involve a massive intervention by this court into the state's electoral machinery. The plaintiff contends that his new request would result in only a minimal amount of cost and confusion to the state. The court notes, however, that any order which it would issue at this late date that had the effect of interfering in a significant aspect of the elections process would be likely to cause great confusion among the voters, the candidates, and the officials charged with carrying out that process. Some, perhaps many, would-be voters may well abandon their plans to exercise their franchise. As this court pointed out in denying the plaintiff's previous motion for injunctive relief, to the extent to which public policy favors a strong and representative voter turnout, the proposed remedy

runs strongly contrary to the public interest.[10.15]

More important, however, is the suppressed predicate to the plaintiff's current request: the only reason why this court would consider enjoining certification of the election results would be to further consider the possibility of compelling new elections in revised districts. As we explained at the hearing on the plaintiff's last motion, even if the plaintiff had satisfactorily proved that the apportionment plans were unconstitutional, that measure of relief would be inequitable and inappropriate at this time.

The problem is badly exacerbated, of course, by the fact that the plaintiff brought on his motions too late for this court fully to consider the merits of the claim and accord relief without fundamentally disrupting the state

processes. As three judges in the District of Columbia Circuit concluded when faced with a similar eleventh hour request:

> We believe plaintiffs have waited too long in bringing their allegations of unconstitutionality of the Act for this court to act responsibly without interfering with the date of the November 5, 1974 election. A court must have time for study and reflection. The judicial process does not work well in a hurry.
>
> ....
>
> In Reynolds v. Sims, supra, the Supreme Court cautioned against taking action in a case where the election was imminent, even where constitutional defects in the election process have already been found. The Court stated: "However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the

> timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by MR. JUSTICE DOUGLAS, concurring in Baker v. Carr, "any relief accorded can be fashioned in the light of well-known principles of equity." 377 U.S. at 585, (emphasis added; footnote omitted). We heed the Supreme Court's caution in this case, where constitutional invalidity has yet to be demonstrated.

Dulcan v. Martin, 64 F.R.D. 327, 329-30 (D.D.C.1974). Indeed, following the Supreme Court's admonition in Reynolds v. Sims, a host of district courts have refused to intervene in state electoral processes shortly before elections were to take place, even where the remedy requested did not entail injunction of the elections themselves. See e.g., Williams v. Rhodes, 393 U.S. 23, 33-34 (1968); McCarthy v. Noel, 420 F.Supp. 799, 804-05 (D.R.I. 1976); Dulcan, supra; see also, Simkins v. Gressette, 495 F.

Supp. 1075 (D.S.Car. 1980), affirmed, 631 F.2d 387 (4th Cir. 1980) (Holding that when "suit is commenced a very short time before the election process begins, 'the federal courts should withhold relief regardless of the plaintiff's claim.'" Id. at 1080-81 (original emphasis, citation omitted).[10.16]

The plaintiff contends that this falls into the small class of voting rights cases in which last minute relief was granted because the bad-faith conduct of state officials precluded the plaintiffs from making earlier application. See, e.g., Herron v. Koch, 523 F.Supp. 167 (E.D. & S.D. N.Y. 1981). In this case, the plaintiff alleges a consistent pattern of bad faith and intentional delay by state officials. Suffice it to say that the court is not much impressed with those allegations, at least as they relate to the California Supreme Court's

decision and events subsequent thereto.[10.17] More to the point, however, the court cannot avoid the fact that no one but the plaintiff can be faulted for his failure to request injunctive relief at a substantially earlier point in the course of this litigation. There is no indication in the record as to why the plaintiff did not bring on an appropriate motion as early as February, 1982, when he filed the lawsuit. [Footnote: For that matter, there is no good reason why the plaintiff could not have requested the relief he now seeks while the court was considering his earlier motion for an order enjoining the conduct of the election itself.] At that point it may well have been possible to accord plaintiff the relief he now seeks without effecting a great and mischievous intervention into the state's election process. At this point it is not.

Accordingly, the plaintiff's motion for a "temporary injunction" is denied.[10.18]

IT IS SO ORDERED.

/s/ Kennedy, J.*

/s/ Karlton, J.

/s/ Ramirez, J

Dated November 1, 1982

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*Signed in absentia by his law clerk after reading the order to Judge Kennedy over the telephone.

Plaintiff's Contextual Footnotes:

10.01 Plaintiff notes at 11 Record 244: "The California Supreme Court ruled out the existing congressional districts on the grounds that this would require at-large elections (violating Article XXI's ban on multi-member districts) for California's two additional congressional seats which were gained in the 1980 census. The minority opinion (at p. 4) also supports this line of reasoning."

10.02 Plaintiff responds at 15 Record 289:
"The action of the Supreme Court in rejecting an appeal from Assembly v. Deukmejian in no way impairs plaintiff's claims in this litigation. The Assembly noted (at 3 Record 235) regarding that appeal,

> '[In] Republican National Committee v. Burton, 456 U.S. 941 (1982) . . . . [t]he sole issue raised in the appeal concerned whether congressional candidates could be made to run at-large under 2. U.S.C. § 2(c), a matter not raised in Mr. Halliwell's complaint.'

(The proposal which was rejected in R.N.C. v. Burton supra was for each of the old 43 congressional districts to elect one congressman, with California's two additional congressmen to be elected at-large.) In Assembly v. Deukmejian at 30 Cal. 3d 657 n. 14

the State Court ruled out continued use of the old congressional districts in at-large elections on independent state grounds: 'Moreover, the old congressional district boundaries have been repealed. (Stats. 1081, Ch. 535, § 1.) No referendum was filed against that portion of Chapter 535 which repealed the old congressional boundaries.' These state grounds have nothing to do with any of plaintiff's claims, and in fact plaintiff supports the abandonment of the old congressional districts and opposes at-large congressional elections."

10.03 Plaintiff responds at 11 Record 245-246:
"The instructions in the Order of October 27, 1982 would indeed have facilitated plaintiff's appeal if Judge Karlton had not given contrary instructions to the court reporter in chambers immediately after the hearing. After conferring with Judge Karlton the court reporter refused to start work on a transcript of the hearing; all he would say is, 'Write me a letter.' It was only after plaintiff protested to Chief Judge Wilkins that the court reporter agreed to start work on the transcript. (See 5 Record 398-399.)"

10.04 Plaintiff responds at 11 Record 239-241:
"In spite of explicit instructions given to the court reporter at the

October 27, 1982 hearing, to 'directly prepare' a transcript of the proceedings, when plaintiff approached the court reporter to arrange for forwarding the hearing record to the Supreme Court he was informed that other cases would keep the reporter from starting on the hearing transcript until after the election. It took several days for plaintiff to get preparation of the transcript expedited (see 5 Record 398-399 for details), and since the court reporter refused to take responsibility for forwarding the transcript to the Supreme Court plaintiff had to fly to Sacramento on Monday, November 1, 1982 to make these arrangements.

"Since the Court had not ruled on the motion actually presented by plaintiff at the October 27 hearing and since 'Ordinarily an appellate court does not give consideration to issues not raised below.' Hormel v. Helvering (1941) 312 U.S. 552, 556, plaintiff sought a ruling from this court on November 1, 1982 so he could appeal to the United States Supreme Court. Since this Court had expressed concern that any pre-election modification in the electoral process 'would create sufficient confusion as to discourage many voters from going to the polls at all,' plaintiff modified his proposal to propose simply embargoing release of election returns until the Court had decided on an appropriate standard of comparison for validating the results of congressional and state legis-

lative contests.

"In the motion submitted on November 1, 1982 plaintiff argued:

> 'A major motivation for the"run-out-the-clock" strategy to prevent judicial consideration of this case on its merits before the November 2 election [see 5 Record 260-266] has been the wish to avoid a determination of the constitutionality of the districts which have been foisted upon California voters even though they have resoundingly rejected all three sets of districts. This "run-out-the-clock" strategy employed by the advocates of the Legislature's redistricting plans has been so spectacularly successful that no state or federal court has EVER ruled on the constitutionality of these plans even though there is overwhelming proof in the case record of their unconstitutionality. The fundamental issue in this case thus has become whether it is constitutional to disregard State and Federal Constitutions in a matter of critical importance to California's institutions of representative democracy.
>
> 'The strategy of endless delays in enactment and adjudication has succeeded because so many people have wished to avoid causing embarrassment to those responsible for the present situation.

> Judges themselves are not politically neutral; therefore due process of law must avoid "every procedure which would offer a possible temptation to the average man as a judge." In re Murchison (1955) 349 U.S. 133, 136. Indeed, it would be very difficult to find any California judges who do not have strong preferences in various congressional and state legislative contests. Given the existence of such preferences it would be very difficult to avoid being influenced in one's decisions concerning proper remedies for the present situation when the impact of the various remedies on particular candidates is known.' (5 Record 401-402.)"

10.05 Plaintiff responds at 11 Record 247:

> "'Allegedly on the basis of advice given him by a law clerk to Mr. Justice Rehnquist, the plaintiff now limits his request to an order enjoining the certification of results in the disputed election' sounds as though plaintiff claimed substantive support for his motion from Mr. Lorson's advice. The only claim plaintiff made regarding advice from Chief Deputy Clerk Francis J. Lorson was that Mr. Lorson had pointed out that the Supreme Court would prefer to rule on the same motion as denied by

the lower court rather than on a motion raised for the first time on appeal (5 Record 400). However, an appeal to the U.S. Supreme Court obviously should request relief that is also still feasible at the time of the appeal; this is why the new motion of November 1, 1982 was submitted to this panel; on PROCEDURAL advice from Mr. Lorson."

10.06 Plaintiff responds at 11 Record 247-248:

"In an effort to get a lower-court ruling on a motion which would still be feasible by the time the lower-court ruling was made, plaintiff did request a hearing on his more limited motion and determined that Mr. Yee, counsel for the defendant, likewise wished an opportunity to argue the merits of plaintiff's motion to embargo election returns. The ex parte conferences mentioned were proposed to arrange guidelines for the hearing which would avoid a repetition of the acrimony of October 27.

'Since ex parte conferences are allowed in TRO proceedings plaintiff hopes that it will be possible for him to confer briefly with Judge Karlton and thereafter with each of the other two judges on the panel in order to arrange guidelines which will allow consideration to focus upon the best interests of the people of California rather than on past difficul-

ties over the rules as applied by Judge Karlton.' (5 Record 400.))"

10.07 The Court actually refused to rule on the merits in spite of the following plea by plaintiff at the October 27, 1982 hearing:
"I wish to state at the outset I emphatically support the motion of the Assembly to convert this into a judgment on the merits. If the court rules on the merits, this case will not go into the record with no judgment on the merits from any of the courts that considered it, including the California Supreme Court.

"If the Court declines to rule on the [merits] then we are faced with a very critical issue: Is it constitutional to disregard the Constitution? There are serious rights of people involved here. The right of the referendum to mean something. What Court would tolerate an apportionment plan which is absolutely perfect, but after the people voted [the winners] were not allowed to take office. But instead of that a supreme court designated other people to take office. This is precisely what has happened in terms of [the referendum on] these districts.

"What court has ever expressly ruled that total disenfranchisement is an acceptable way of saving 12 million dollars? [That was the cost] of a special election [on the referendum] that could have

been held in advance of the primary, and the regular primary could have been held in June." (11 Record 191-192).

10.08 Plaintiff responds at 11 Record 249:
"This standard of review would be equitable IF THE PUBLIC INTEREST WERE CONSIDERED ON BOTH SIDES OF THE QUESTION: but the order later goes on to weigh potential damage only to PLAINTIFF'S political rights against the potential hardship to THE GENERAL PUBLIC that allegedly would be incurred by granting the relief sought."

10.09 Plaintiff responds at 11 Record 253-255:
"This aspect of plaintiff's case had been thoroughly documented (1 Record 119-129) in plaintiff's inclusive complaint of March 10, 1982, and no rebuttal has ever been offered by defendants nor insisted upon by this Court; so if this Court was in October 1982 still unable 'to make any intelligent determination' whether excessive population disparities existed in the A.B. 301 congressional districts it was certainly unfair to refuse to consider injunctive relief on these grounds. On the contrary; in Herron v. Koch (1981) 523 F.Supp. 167 it was just such refusal by defendants to supply information that the court used to justify the injunctive relief. Judge Karlton acknowledged this

aspect of Herron v. Koch at the October 27 hearing (see Transcript at 9).

"The passage in Assembly v. Deukmejian to which the Court accords deference in lieu of analysis of the factual evidence at hand contains only these two sentences relating to congressional districts:

> 'Every member of this court agrees, and most parties concede, that the old, out-dated district plan of 1973 is unconstitutional and may not be used for the congressional elections. The only alternative open to the court is the reapportioned districts adopted by the Legislature and approved by the Governor.' 30 Cal.3d at 674.

The old 1973 congressional districts were widely conceded to be unsuitable for continued use because there were only 43 of them and California had been allocated 45 congressional representatives by the 1980 census. The only feature of the Legislature's congressional plan other than its providing 45 districts which is mentioned anywhere in the majority opinion of Assembly v. Deukmejian is that county clerks [acting on instructions from the defendant in Halliwell v. Eu] had already performed two to four months of computer programming for these districts. (See 30 Cal.3d at 658.) Assembly v. Deukmejian is unique

among cases wherein a court adopts its own congressional redistricting plan in that the court makes absolutely no mention of the population disparity in the districts which it orders into effect.

"In Assembly, on the page cited by the Order, the court does go on to allege that since the Legislature's congressional plan 'must' be used in 1982 the Legislature's state legislative plans should also be used.

> 'If the 1982 congressional reapportionment plan must of necessity be used in the 1982 elections, it is clear that there are no compelling reasons why the 1981 reapportionment statutes governing the Assembly and Senate should be discarded for the old, unconstitutional districts of 1973. This temporary plan allows the primary and general elections to be held in districts that more nearly comply with the constitutional mandate of one-person, one-vote.' 30 Cal. 3d at 674.

From the similarity of the last sentence to 'it was far and away the most satisfactory plan available in terms of compliance with the one person, one vote mandate' in the Order of November 1 it appears that Judges Karlton and Ramirez (Judge Kennedy did not participate in the drafting of the order) have lost track of the subject of the last sentence: appar-

ently they confused a comparison of population disparities in the 'old, unconstitutional districts' adopted in 1973 for Assembly and Senate and their 1981 counterparts with a selection on the basis of one person, one vote compliance of the Legislature's congressional plan from among the congressional plans available to the California Supreme Court. The California Court never engaged in such a selection process."

10.10 Plaintiff responds at 11 Record 256-257:

"Apparently the Order relies on a statement by counsel for the Assembly at the October 27 hearing:

> 'The only evidence of record now before this court on the question of the Assembly Districts is the affidavit of James Tucker filed YESTERDAY which points out the maximum deviation in the State of California Assembly Districts is 3.92 percent.' Hearing Transcript at 35. Emphasis added.

The Assembly has refused to provide population subtotals which would make it possible to verify the alleged district populations in Mr. Tucker's affidavit. However, 25 AD had been involved in a previous dispute, so on June 14, 1982 plaintiff had had occasion to cite an error of nearly 5,000 in the population of that district among other examples of the Assembly's sloppy analysis of data.

'The 25 AD may be taken as an example of what discrepancies may exist, since it was involved in a dispute over Voting Rights Act compliance so the Rose Institute carefully checked the census units assigned to it by A.B. 300 and Mr. Remcho's corrections list. The Rose Institute determined that this district's population is 304,975 (cf. 'Redistricting California 1981: Statistics'). In Exhibit A of a brief mailed to plaintiff by Mr. Remcho's firm on February 25, 1982 [in Assembly v. Deukmejian windup proceedings involving attorneys' fees; this same affidavit was filed by Mr. Remcho in these proceedings on October 26, 1982] the population listed for 25 AD is 300,093 -- almost 5,000 less than the Rose Institute figure which places this district more than 3% above the ideal Assembly district population.' (4 Record 10.)"

10.11 Plaintiff responds at 11 Record 257:

Whatever may be said by this Court in defense of not applying the compactness and whole political subdivision guidelines established in Connor v. Finch (1977) 431 U.S. 407 (see Order of July 1 at note 8, 4 Record 61) for court-ordered plans, the de minimis population disparity requirement established by Chapman v. Meier (1975) 420 U.S.

1, 26 for court-ordered plans must surely be applicable since Assembly v. Deukmejian (at 667) invokes this requirement as part of its rationale for adopting the Legislature's Assembly plan."

10.12 Plaintiff responds at 11 Record 258-259:

"The California Supreme Court simply cannot have acted in good faith in adopting the DISTRICT NUMBERING system of S.B. 99 without even discussing the matter, since those disenfranchised by odd-even numbering switches fervently beseeched the Court to correct this situation in amicus curiae petitions filed in Assembly v. Deukmejian. No conceivable legitimate state need could have been undermined by holding senate elections in 1982 in the districts where most of the people had voted for senator in 1978 and waiting until 1984 to hold senate elections in districts where most of the people voted for senator in 1980.

"It is completely obvious that interchanging the numbers of S.B. 99's proposed senate districts 6 and 11 and the numbers of S.B. 99's proposed senate districts 32 and 37 was feasible, since precisely this kind of last-minute senate district renumbering had been ordered in Legislature v. Reinecke IV (1973) 10 Cal.3d 396, 404 and easily accomplished. This switch would have eliminated the double representation of two senate districts and the disenfranchisement of two

others. If 'it is simply not possible for this court to test' whether single representation of each of the roughly equally populated districts in S.B. 99 satisfies the United States Constitution better than double representation of some districts and disenfranchisement of others it is not plaintiff's case which is at fault for this inability."

10.13 Plaintiff responds at 11 Record 259-261:

"Neither of the two cases cited by the Order of November 1 as involving the 'renumbering of legislative districts' involved any deferral of scheduled elections in a district where most of the people in the district were due to elect a senator.

"On August 23, 1982 plaintiff pointed out to this Court (4 Record 285-286) that the passage from Ferrell v. Oklahoma (1972) 339 F.Supp. 73, 82 on which the Order of November 1 relies was quoted out of context by the Senate. In 339 F.Supp. at 81 the Ferrell court notes that terms were shortened 'in Senate Districts 18, 28 and 30 in order to avoid those three districts having two senators each in new districts' and that this 'provides that the citizens of each district will be equally represented at all times by a senator.' All that the portion of Ferrell cited by the Senate affirmed is that some individuals who were residents of former dis-

tricts where senate elections were due must be transferred by redistricting into new districts where elections are not yet due.

"In the same August 23 brief plaintiff pointed out (4 Record 287-289) that the quotation from Mader v. Crowell (1980) 498 F. Supp. 226, 231 on which the Order of November 1 relies was also taken out of context when cited to this Court by the Senate. In 498 F.Supp. at 230 the Mader court provides the antecedent to the court's conclusion that such claims 'fail to rise to constitutional magnitude.' On that page that court notes: 'The parties have stipulated that the challenged reapportionment plan shifts approximately 117,000 persons from even-numbered districts to odd-numbered.' This is less than the ideal population of one district SPREAD OVER ALL THE DISTRICTS in Tennessee; this is in no way comparable to the situation created in California by the district numbering system of S.B. 99.

"In the same August 23 brief (4 Record 291-293) plaintiff cited two cases, McCall v. Legislative Assembly (1981) Oregon, 634 P.2d 223, 236 and In re Reapportionment of the Colorado General Assembly (1982) Colorado, 647 P.2d 191, 198-199 where senate districts were deprived of representation by odd-even number switches, and in both instances this was ruled to be a denial of equal representation. The fact that these cases were decided by state supreme

courts rather than federal courts does not eliminate them as the precedents most applicable to the misnumbering situation in California."

10.14 Plaintiff responds at 11 Record 262-264:

"Plaintiff has never made any allegation concerning the population of his own Assembly district. The Assembly has refused to provide the essential subtotals for divided census tracts which would allow plaintiff to make such a determination. It is the Assembly, not plaintiff, which has made the (unverifiable) allegation to which the Court refers.

"If plaintiff had had any expectation that this Court would resurrect previously discredited narrow definitions of standing in its determination of injuries cognizable for purposes of interim relief plaintiff would have spent more of his very limited hearing time on articulating his own personal injuries rather than the broader injury to the general public arising from the use of the contested districts. Addressing this aspect of the Order in its own terms, the following observations are relevant.

"First, the underpopulation of plaintiff's own 27 CD is due to assignment of military personnel on active duty to the district even though neither their military bases nor their permanent residences are in the district. Statewide this is

done consistently so as to make Republican-leaning districts larger in population than Democratic-leaning districts. Thus the statewide harm to plaintiff's interests as a Republican outweigh any small enhancement of plaintiff's voting power in his own district. Moreover, the Order of July 1, 1982 (at 4 Record 49) squarely recognizes as a justiciable grievance partisan gerrymandering by means of systematic population disparities.

"Furthermore, even the underpopulation within plaintiff's own district operates to plaintiff's disadvantage; for the district is a Democratic enclave with Republican precincts along its inland side, so bringing that district up to the ideal population would enhance a Republican candidate's chances of winning. At the October 27 hearing plaintiff was interrupted as he began to draw a parallel between his own standing situation and that of Dade County residents in Swann v. Adams in that standing in that case was based on the potential ripple effect arising from changes in adjoining districts (Hearing Transcript at 17; Swann v. Adams 385 U.S. at 443.): 'If I had a knife-edge margin' in a race in my congressional district, and it has been very closely contested in recent elections, the ripple effect from practically any change in nearby districts would probably tip the balance in favor of the

Republican candidate, because all the available Democratic areas are already included.

"In 'Going to the other prong of the test' as it does, the Order focusses narrowly on the degree of PERSONAL INJURY to PLAINTIFF which may result if his plea for injunctive relief is denied and refuses to even discuss plaintiff's extensive, documented and reiterated points regarding the COLLECTIVE BENEFITS of valid elections and the severe injury to the body politic resulting from the use of districts that are neither constitutionally enacted nor constitutionally adequate in terms of the characteristics of the districts. If the Court were consistent it would weigh plaintiff's personal injuries against those to be suffered by the individual DEFENDANTS, March Fong Eu, Willie Brown, Art Agnos, Richard Alatorre and David Roberti; but instead the Court applies a very broad definition of the COLLECTIVE COSTS of any injunctive relief."

10.15 Plaintiff responds at 11 Record 264-265:

"The so-called 'massive intervention into the state's electoral machinery' proposed by plaintiff in fact consisted only of a delay for a few days in the counting of ballots. As Chief of the Secretary of State's Elections and Political Reform Division William N. Durley

mentions at 3 Record 366, a similar delay took place in San Joaquin County in following the June 8, 1982 primary election. All election returns for every office in that county were embargoed by the Secretary of State until the status of certain ballots could be clarified. This action did not cause 'great confusion among the voters, the candidates, and the officials charged with carrying out that process.' All that ensued was some additional nail-biting by San Joaquin County candidates and their supporters. Since there was no reason to publicly announce the embargo on counting ballots before the polls closed on Primary Election Day, the Secretary of State did not do so. Therefore there were no 'would-be voters [who] abandon[ed] their plans to exercise their franchise.'"

10.16 Plaintiff responds at 11 Record 267-268:

"In plaintiff's opening complaint (at 1 Record 17) he sought to enjoin and restrain the Secretary of State 'from implementing and conducting elections in the districts set forth in A.B. 301, S.B. 99 and A.B. 300' and urged the Court to act expeditiously to select alternative redistricting plans in order to avoid disrupting the elections schedule. It was Judge Karlton who tolerated defendant's absurd stalling tactics at the outset of proceedings, requiring plaintiff

to make FOUR services of the same papers on defendant. When Judge Karlton finally held a status conference pursuant to plaintiff's request (2 Record 304-316) he refused to discuss the procedural problems outlined in plaintiff's request or to entertain any substantive motions; instead he put off all action until after the Primary, noting in his Order following the status conference: 'It now appears that the plaintiff may still obtain a legally efficacious remedy should he prevail on the merits of this action after this court disposes of the motions brought on pursuant to this order.' (3 Record 43.) But instead of simply disposing of the motions submitted by defendants, Judge Karlton took the occasion to 'hack away' most of plaintiff's case with his no-notice, sua sponte dismissals without leave to amend. Judge Karlton subsequently refused to clarify the appealability of his dismissals without leave to amend and then persuaded the full panel not to consider even the aspects of the case not involved in plaintiff's appeal until October 27, 1982, less than one week before the General Election. The Court would not rule on the motion plaintiff actually advocated at the October 27 hearing and refused to make arrangements 'for this court fully to consider the merits.' Even with only one day left before the election the two members of

the court present in Sacramento could have held a hearing to clarify the Court's understanding of the issues in the case."

10.17 Plaintiff responds at 11 Record 269-270:

"At the October 27 hearing (see Transcript at 10-11) plaintiff pointed out the undeniable fact that the California Supreme Court's protracted period for consideration of an utterly frivolous challenge to the validity of referendum petitions with two and a half times the necessary number of VALIDATED signatures had, according to the Court, left no time for the implementation of any other plans besides those blocked by these petitions. The violations of the Voting Rights Act involved in Herron v. Koch were certainly much more equivocal than the outright abrogation of referendum stay provisions in Assembly v. Deukmejian. This panel has shown itself to be 'not much impressed' with the requirement of 28 U.S.C. § 2284(b)(2) that 'The hearing shall be given precedence and held at the earliest practicable day' and has put forward one ill-founded excuse after another for taking no action in this case. It is therefore not surprising that the Court has found nothing wrong with the stalling tactics of various Democratic officials involved in Assembly v. Deukmejian and in Halliwell v. Eu."

10.18 Plaintiff responds at 11 Record 270-271:

"Plaintiff did seek to enjoin use of the contested districts from the outset of these proceedings. It would certainly not have been appropriate to seek a ruling on this request before an appropriate record had been compiled regarding the constitutional violations in these districts.

"Moreover, any such effort would have gotten plaintiff nowhere; in Richardson v. Eu, which involved only a single very clear-cut issue (whether a district may be deprived of its representative in the State Legislature), the Senate was able to mount a frivolous challenge to the convening of a three-judge court which delayed action in that case for six months.

"Plaintiff certainly did try at the October 27 hearing to persuade this Court to rule on a less intrusive remedy than enjoining the conduct of the election, but the Court insisted upon ruling on the motion which plaintiff had withdrawn rather than on his actual request that the Court adopt a pre-election standard by which to evaluate the adequacy (notwithstanding districts' quantified constitutional defects) of winners' victory margins in each district. When plaintiff learned of this Court's refusal to rule on the substitute motion which plaintiff had offered he immediately stepped forward to try to make arrangements for the

Court's further consideration of potential remedies which would not disrupt the elections process; but in spite of plaintiff's plea that the Court's refusal to accord further consideration effectively destroyed his right to appeal to the U.S. Supreme Court, this Court walked out. See Hearing Transcript at 51-52."

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judge Lawrence K. Karlton

Item # 11 (6 Record 5-6)

Filed November 15, 1982

IT IS ORDERED that a Status Conference in the above entitled case will be held on December 6, 1982, at 2:00 p.m. in Courtroom No. 1, before the Honorable Lawrence K. Karlton, pursuant to Local Rule 125.[11.01]

The parties shall appear in person or through counsel. Such Status Conference shall not be continued. Each party shall file a Status Report with the court and serve same upon opposing counsel not later than December 1, 1982. The report shall briefly set forth the views of the party making the report on the following matters:

(a) Service of process on parties not yet served:

(b) Jurisdiction and venue;

(c) Anticipated motions;

(d) Anticipated or outstanding discovery;

(e) Further proceedings, including

setting dates for a further Status Conference, if necessary, discovery cut-off, pretrial and trial;

(f) Appropriateness of special procedures such as reference to a special master or Magistrate or the Judicial Panel on Multidistrict Litigation, or application of the Manual for Complex Litigation;

(g) Modification of the standard pretrial procedures specified by the Rules because of the relative simplicity or complexity of the action or proceedings.

(h) Prospects for settlement:

(i) Any other matters which may be conducive to the just, efficient and economical determination of the action or proceedings.

It is contemplated that as a result of this conference a formal order will issue regarding the future course of litigation.[11.02]

Plaintiff is directed to serve copies of this order at once upon those parties subsequently joined and file with the clerk of the court a certificate reflecting such service.

IT IS SO ORDERED.

/s/ Lawrence K. Karlton
U.S. District Judge

Dated: November 15, 1982

Plaintiff's Contextual Footnotes:

11.01 Plaintiff notes at 11 Record 272-273:

> "A key factor in scheduling the June 11, 1982 hearing after the primary election had been Judge Karlton's willingness to accommodate Mr. Remcho's desire that the hearing be held on a Friday. In this [post-election] status conference request Plaintiff indicated that setting the conference on a Thursday or Friday (or early enough on a Tuesday for him to fly back to Los Angeles to teach an evening class) would avoid disrupting his teaching schedule. Nevertheless Judge Karlton set a date for the status conference on a Monday (6 Record 5-6) and nearly a month after Plaintiff's request."

11.02 Plaintiff observes at 11 Record 273-274:

> "Delaying the status conference until December 6, 1982 made it impossible for Plaintiff to secure action on the senate district misnumbering issue before the prematurely elected senators from 6 SD and 32 SD had been seated unless the Court granted an interim temporary restraining order against seating these senators. Therefore in his status conference report (6 Record 14-27), filed pursuant to Judge Karlton's order setting the conference, Plaintiff noted:
>
> > '[P]laintiff will seek the earliest possible ruling on the constitutionality of double

representation for the residents of 6 SD and 32 SD and total disenfranchisement of the residents of 11 SD and 37 SD. In his request of October 11, 1982 for an immediate hearing on this subject Plaintiff proposed that the Court "enjoin the elections now scheduled which will provide residents of 6 SD and 32 SD with double representation in the Senate." A request that this issue finally be acted upon was rejected, apparently on the grounds that a new motion is now needed to preclude the seating of these two extra senators.

'Plaintiff therefore formally proposes the following:

a) THAT THOSE TWO NEW SENATORS 'ELECTED' ON NOVEMBER 2, 1982 FROM 6 SD AND 32 SD BE ENJOINED FROM TAKING SEATS IN THE CALIFORNIA LEGISLATURE ON THE GROUNDS THAT THESE DISTRICTS ARE ALREADY FULLY REPRESENTED IN THE STATE SENATE:

b) THAT IF THE COURT PERCEIVES ANY DIFFICULTY IN REMOVING THESE IMPROPERLY ELECTED SENATORS AFTER THEY ARE SEATED IT EITHER ACT ON THIS MOTION BEFORE DECEMBER 2, 1982 OR ISSUE WHATEVER TEMPORARY RESTRAINING ORDER IT DEEMS NECESSARY AND APPROPRIATE TO PRESERVE ITS POWER TO ACT EFFECTIVELY ON THIS MATTER AFTER DECEMBER 2, 1982.' (6 Record 22-23. Emphasis in original.)"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judges Kennedy, Karlton and Ramirez

Item #12 (6 Record 45)

Filed December 3, 1982

Pursuant to the provisions of 28 U.S.C. § 2284, the judges of this court hereby delegate to the Hon. Lawrence K. Karlton, United States District Judge, full authority to preside at the Status Conference in the above-captioned case (scheduled for December 6, 1982),[12.01] and to make all determinations[12.02] and issue all orders necessary to and resulting from that conference.[12.03]

IT IS SO ORDERED.

/s/ Kennedy, J.

/s/ Karlton, J.

/s/ Ramirez, J.

Dated: December 3, 1982

Plaintiff's Contextual Footnotes:

12.01 Plaintiff notes at 11 Record 276-277:

"Most of the time at the December 6 status conference was taken up by Judge Karlton's discussion of the problems arising from the fact that no one had intervened in defense of the congressional redistricting plan. Plaintiff pointed out that he had invited both Representative Burton, who devised the A.B. 301 districts, and Representative Thomas, who was the redistricting spokesman for California's Republican congressmen in Assembly v. Deukmejian, to intervene soon after Halliwell v. Eu was filed and has provided both with copies of his inclusive complaint (see 1 Record 273). Judge Karlton suggested that the entire California congressional delegation probably were indispensable parties to the case and directed the Assembly to file a motion in favor of dismissing the congressional aspect of Halliwell v. Eu unless Plaintiff promptly served a summons and complaint on each of California's 45 congressional representatives."

12.02 Plaintiff's account of the December 6, 1982 status conference continues at 11 Record 277:

"Plaintiff complained of the refusal of the Assembly to provide him with a copy of materials lodged with the Court on June 11, 1982 and with a copy of the transcript of the September 9, 1981 hearing on

A.B. 300. Plaintiff also protested the refusal of the Assembly to provide listings of the divided census units in each district needed to verify their population claims and the refusal of the Senate to file any population data at all. Plaintiff was told that his written requests for these items were of no significance without a discovery request filed in accordance with a procedure which Judge Karlton refused to describe."

Plaintiff cites the December 6, 1982 hearing transcript at 17 Record 59: "When asked to indicate what procedure was necessary to compel production of this information Judge Karlton said, 'I keep telling you I can't be your lawyer, Mr. Halliwell.' Hearing Transcript at 18."

12.03 Plaintiff explains his motion to revoke this order at 17 Record 59-60:

"Plaintiff tried without success to resolve several ongoing procedural obstacles to adjudication, including the Court's practice of simply ignoring his motions and its ban on Plaintiff's communications with the staff of the judge conducting proceedings. Plaintiff then asked the Court, 'I've tried as hard as I can to be conciliatory; are you telling me my opportunity is at an end at this point to work out some arrangements for some of these things I have on my list?' Transcript at 20.

"When the Court insisted on

scheduling yet another wave of dismissal motions (the fourth, and including a frivolous challenge to the Court's subject-matter jurisdiction which one of the Senate's two law firms thought was lacking in merit) and on delaying a decision on the merits until after ruling on these motions, Plaintiff moved that Judge Karlton be recused by the full Court from operational control of proceedings. Plaintiff explained:

> 'Number one, this motion is offered only because I have not been able to set up a proper arrangement with the judge who is now presiding. It is directed only at his presiding, not his membership on the panel, and the other issue involved is restoration of communication with his clerk.' Transcript at 25."

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judge Lawrence K. Karlton

Item # 13 (6 Record 274-276)

Filed December 16, 1982

Pursuant to court order, a Status Conference was held on December 6, 1982.[13.01] MICHAEL J. HALLIWELL appeared in propria persona, WILLIAM YEE appeared as counsel for defendant March Fong Eu, BARBARA BRENNER appeared for defendant Assembly of the State of California, and TERESA FERGUSON and BENJAMIN SCHEIBE appeared as counsel for defendant Senate of the State of California. After hearing, the court makes the following findings and orders:

1. Service of Process. Service of process has been completed on defendant March Fong Eu and defendants in intervention Assembly and Senate of the State of California. The court has raised the question as to whether the members of the California Congressional Delegation, either individually or as a body, are necessary parties to this litigation within the meaning of Fed.R.Civ.P. 19(a).

In this regard, the defendant Assembly shall bring on a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(7) under the motion schedule set forth below.[13.02]

2. Jurisdiction/Venue. The court's jurisdiction over the subject matter of this case is predicated upon 28 U.S.C. §§ 1331 and 1343. The defendant Secretary of State and the defendant Assembly concede that this court has subject matter jurisdiction in this case; the defendant Senate, however, contests the court's jurisdiction.[13.03] Accordingly, the defendant Senate shall bring on an appropriate motion pursuant to Fed.R.Civ.P. 12(b) under the motion schedule set forth below. All parties concede that venue is proper in this court.

3. Anticipated Motions. In addition to the motions discussed in paragraphs 1 and 2, above, the defendant Senate has a motion to dismiss now pending before

this court, and seeks leave to supplement that motion with additional memoranda. That leave is now granted, and such supplemental material shall be filed in accordance with the briefing schedule set forth herein. The plaintiff desires to bring on a motion to disqualify Judge Karlton from presiding at future hearings.[13.04] Plaintiff also anticipates bringing on a motion or motions for some form of preliminary injunctive relief. Finally, the plaintiff has outstanding a motion asking the court to reconsider Judge Karlton's order of July 1, 1982. All of the foregoing shall be submitted according to the following schedule, and only according to that schedule: the motions shall be filed and served with supporting memoranda not later than January 7, 1983. Briefs in opposition (or statements of non-opposition) shall be filed and served not later than

January 27, 1983. The moving parties may file and serve reply briefs not later than February 7, 1983. The court will hear oral argument on all of these matters on February 16, 1983, at 1:30 p.m.

4. Further Proceedings. All decisions regarding other matters in this case are now deferred pending disposition of the motions to be heard by the court on February 16, 1983.

IT IS SO ORDERED.

/s/ Lawrence K. Karlton
U.S. District Judge

Dated: December 16, 1982

Plaintiff's Contextual Footnotes:

13.01 Plaintiff notes at 11 Record 282: "Because of problems of meshing the schedules of the three members of the panel, the early January hearing date agreed to at the December 6, 1982 status conference was abandoned and a February 16, 1982 date was substituted."

13.02 Plaintiff observes at 11 Record 283: "Thus, in spite of nearly a year of effort by plaintiff to secure adjudication of his congressional claims, this aspect remained firmly on square one."

13.03 Plaintiff notes at 11 Record 283: "Judge Karlton then grants the Senate permission to bring forward its FOURTH Rule 12 motion before proceeding with this aspect of the case."

13.04 Plaintiff explains at 11 Record 284: "In fact Plaintiff was concerned about Judge Karlton's actions in deciding procedural matters on his own, and Plaintiff was not concerned about Judge Karlton's actions when in the company of his two colleagues at a hearing. Had Plaintiff's motion been granted all three judges would have participated in procedural decisions."

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judge Lawrence K. Karlton

Item # 14 (7 Record 384-385)

Filed January 28, 1983

The court having been apprised of a failure in communication between the court and the parties,[14.01] and good cause appearing therefor,[14.02]

IT IS HEREBY ORDERED that the court's ORDER AFTER STATUS CONFERENCE of December 16, 1982, be, and the same hereby is, amended as follows:

1. The plaintiff's motion for a preliminary injunction ordering new elections in Senatorial Districts 6, 12, and 32 shall remain as previously set and will be heard on February 16, 1983, at 1:30 p.m.;

2. The pliantiff's motion for a preliminary injunction ordering special, interim elections in all California congressional and state legislative districts shall be continued from February 16, 1983, to a date to be set when the parties are before the court on February 16, 1983;[14.03]

3. The parties may then request the court to enter an order scheduling the filing of briefs and hearing of other appropriate motions.

IT IS SO ORDERED.

/s/ Lawrence K. Karlton, Chief Judge
United States District Court

Dated: January 27, 1983

Plaintiff's Contextual Footnotes:

14.01 Plaintiff gives the background of this incident at 17 Record 61-62:

"Plaintiff submitted two updated remedial proposals, one calling for term shortening (as was done in Cosner v. Dalton (1981) 522 F.Supp. 350 to remedy unconstitutional redistricting plans in circumstances similar to those in California) for all congressional and state legislative districts and one to exclude from the Senate improperly elected senators from districts that continued to be represented by carry-over incumbents.

"The Assembly promptly defaulted on its obligation to respond (to an injunctive proposal which affected its own districts) in accordance with the order of December 16, 1982. Instead the Assembly argued in a January 25, 1983 filing:

> 'The Defendant-Intervenor Assembly opposes Plaintiff's motion for the setting of a special election. The motion is untimely.' (7 Record 197.)

The Assembly contends that Plaintiff has misinterpreted the Court's briefing order and puts forth its own interpretation:

> 'The Order Following Status Conference of December 16, 1982 specifies the motions to be heard on February 16, 1983 and explicitly precludes the resolution of other matters until the enumerated motions are resolved. Order Following Status Conference, December 16,

1982, Paragraph 4. It is clear from that order that the Court intends to resolve any and all outstanding jurisdictional matters before considering motions addressed to the merits, thus avoiding the unwarranted resolution of substantive claims.' (7 Record 198.)"

14.02 Plaintiff quotes the terms of the order misunderstood by the Assembly at 17 Record 61:

"The order of December 16, 1982 explicitly included both the Senate's jurisdictional challenge and Plaintiff's proposals for injunctive relief among the motions slated for consideration on February 16, 1983:

'The defendant Secretary of State and the defendant Assembly concede that this court has subject matter jurisdiction in this case; the defendant Senate, however, contests the Court's jurisdiction. Accordingly, the defendant Senate shall bring on an appropriate motion pursuant to Fed.R.Civ.P. 12(b) under the motion schedule set forth below. . . . Plaintiff also anticipates bringing on a motion or motions for some form of preliminary injunctive relief.' (6 Record 275.)"

14.03 Plaintiff notes the Court's failure to live up to this commitment at 17 Record 63:

"However, at the February 16, 1983 hearing the Court took a recess

before any discussion of setting a new briefing schedule and hearing date for Plaintiff's motion deferred by the order of January 28, and instead of returning to the courtroom sent a bailiff to inform the parties that the day's proceedings had been concluded. It was not until the Court's order of April 19, 1983 that a briefing schedule, but no hearing date, was established for Plaintiff's interim special elections proposal."

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judges Kennedy, Karlton and Ramirez

Item # 15 (7 Record 524-526)

Filed February 8, 1983

Plaintiff in the above-entitled action has filed an application for a preliminary injunction and, simultaneously therewith, an application for an order shortening time.[15.01] By his application for an order shortening time, plaintiff requests that his application for a preliminary injunction be heard on an expedited basis. [Footnote: Plaintiff misapprehends that the denial of his application for an order shortening time will result in his application for a preliminary injunction being heard 28 days after the day upon which he filed it. At the Status Conference conducted by the Honorable Lawrence K. Karlton on Decembet 6, 1982, a schedule for the hearing of all motions was discussed and ordered. This schedule prevails over Local Rule 113.[15.02]] For reasons discussed infra, plaintiff's application for an order shortening the time for

noticed hearing on his application for a preliminary injunction is DENIED.[15.03]

"The grant or denial of an application for an order shortening time is committed to the sound discretion of the court. See, United States v. Taulbee, 476 F.2d 804, 805 (9th Cir. 1973). Nowhere in his moving papers does plaintiff establish that irreparable injury will occur if his application for a preliminary injunction is not heard before the day set for the hearing of all other pending motions, February 16, 1983. In his application for a preliminary injunction, plaintiff requests this court to enjoin the Legislature of the State of California from adopting redistricting plans for use in the 1984 elections before the Governor-elect is sworn into office on January 3, 1983.[15.04]

We must assume at this point that if the Legislature adopts a redistrict-

ing plan it will do so in a manner consistent with the order of the California Supreme Court in Assembly v. Deukmejian, 30 Cal.3d 638, cert. denied sub nom. Republican National Committee v. Burton, -- U.S. --, 102 S.Ct. 2003 (1982). If the Legislature adopts an unconstitutional plan it will not be beyond the power of this court to provide relief at that time.[15.05]

Our conclusion is also fortified by the fact that plaintiff's second amended complaint challenges the electoral districts employed in the 1982 primary and general elections and cannot fairly be deemed to put in issue the validity of electoral districts to be employed in the 1984 elections. [Footnote: If plaintiff desires to supplement his complaint, F.R.Civ.P. 15(d), he may, of course, file a motion for leave of court. Such a motion will be heard on the briefing

schedule set by the court's Order After Status Conference, if properly noticed and briefed.[15.06]]

For all the reasons stated herein, the application of plaintiff for an order shortening time is DENIED.

IT IS SO ORDERED.

/s/ Lawrence K. Karlton, Judge
United States District Court

/s/ Raul A. Ramirez, Judge
United States District Court

/s/ Anthony M. Kennedy, Judge
United States Court of Appeals

Dated: December 17, 1982

Plaintiff's Contextual Footnotes:

15.01 Plaintiff explains at 11 Record 286-287:

"Almost immediately upon being sworn into office, members of the Legislature elected from the districts rejected in the June 1982 referenda, with the aid of lame-duck Governor Jerry Brown, took bold steps to evade the mandate of the referenda and cement themselves into office for the remainder of the decade. On December 10, 1982 plaintiff filed an emergency request for an injunction and motion to shorten time (6 Record 47-80) to safeguard the political rights of Californians from an illegally elected legislature operating under a suspension of normal rules at an illegally called special session.

"The clear and present danger to the legitimacy of California's political institutions in these circumstances was palpable. With the two extra senators elected prematurely from 6 SD and 32 SD playing a key role, the leadership of the Senate had issued a 'surrender or die' edict in the form of punitive redistricting proposals that threatened to unseat senators who refused to support an urgency clause which would block any referendum challenge to the Legislature's plan for perpetuating itself in office. If the Assembly there were no disenfranchised or doubly represented districts, but in this chamber political blackmail in the form of punitive redistricting proposals

was also employed to force support of an urgency clause. The extra leverage in the Assembly came from a rules change that allowed a bare majority to take instant action on legislation without observing rules requiring printed bills, consideration by committees, etc.; the Assembly even brushed aside the requirement of Article IV § 8(b) of the California Constitution requiring readings on three separate days for the passage of bills.

"Plaintiff's motion sought to preclude using such tactics to gain political leverage by (1) enjoining any redistricting legislation passed at the illegal special session; (2) requiring observation of applicable rules requiring 2/3 majorities to modify established procedure in the passage of any subsequent redistricting legislation; and (3) unseating the two prematurely elected senators from 6 SD and 32 SD (6 Record 60)."

15.02 Plaintiff responds at 11 Record 288-289:

"On the day of the status conference (December 6, 1982) plaintiff sought to determine from Republican Assembly leader Robert Naylor's staff whether a special session on redistricting had been slated. The Assemblyman had received no information regarding whether this topic had been set for special-session consideration by Governor Brown. In Plaintiff's presence a staff member called Governor Brown's office and asked

whether a special session on redistricting was in the offing; the staff member was told that Governor Brown had not decided whether or not to call such a session. Shortly after the status conference a special session on redistricting was in fact called by Governor Brown.

"Having exercised due diligence in trying to determine whether circumstances might arise that would require urgent consideration by this court, Plaintiff cannot be faulted for failing to ask for a telescoped schedule of consideration at the December 6 status conference on the basis of sheer speculation. Since Judge Karlton had not been apprised of the problems that might arise if the illegally elected extra senators tried to solidify their positions by ramming through a new redistricting plan before the legality of their election had been adjudicated, Judge Karlton's status conference order should not have been given precedence over Local Rule 113 without Plaintiff's being allowed an opportunity to argue against this EXTENSION of time."

15.03 Plaintiff notes at 11 Record 287:

"The panel denied Plaintiff's time-shortening motion on December 17, 1982, and Plaintiff was so informed by telephone. However, Plaintiff did not learn of the grounds for this denial until February 11, 1983, when he received the order of February 8, 1983 which set forth the panel's reasons for

its actions."

15.04 Plaintiff explains at 11 Record 290-291:

"The basis for this request is the clearly illegal nature of the special session on redistricting. Article IV § 3(b) of the California Constitution provides:

> 'On extraordinary occasions the Governor by proclamation may cause the Legislature to assemble in special session. When so assembled it has power to legislate only on subjects specified in the proclamation but may provide for expenses and other matters incidental to the session.'

"As the order of February 8 appears to recognize, the period of time from December 6, 1982 until January 3, 1983 is not an 'extraordinary occasion' requiring the enactment of redistricting plans for use in the 1984 elections. The special session on redistricting obviously was called to evade the mandate of the 1982 elections wherein the Democratic Party lost control of the Governor's Office. It cannot have been the intent of the people of California in adopting Article IV § 3(b) to allow their authority to be thus circumvented. Moreover, Article II § 1 of the California Constitution declares, 'All political power is inherent in the people.' Lame-duck office-holders who have been rejected by the people should not be permitted to usurp the rightful functions of

those selected by the people to govern them on account of a non-existent extraordinary occasion. Furthermore, Article I § 3 of the California Constitution affirms: 'The people have the right to instruct their representatives.' The demonstrable purpose of the special session on redistricting was to evade the instructions given by the people in the redistricting referenda of June 1982.

"Given the stark clarity of the state law in question, Davis v. Mann (1964) 377 U.S. 678, 690 was clearly applicable to the circumstances:

> 'Where the federal court's jurisdiction is properly invoked and the relevant state constitutional and statutory provisions are plain and unambiguous there is no necessity for the federal court to abstain pending determination of state law questions in a state court . . . .'

"Since all the actions of a de facto legislature are generally accepted as valid even if that legislature is later found not to have been constitutionally constituted, the refusal of this panel to adjudicate Plaintiff's challenge to the legality of Governor Brown's proclamation of a special session on redistricting until after that session had enacted redistricting legislation may well have inflicted an irreparable injury on this aspect of Plaintiff's case."

15.05 Plaintiff responds at 11 Record 292:

"Assembly v. Deukmejian at 678 did indeed mandate that any new redistricting plans enacted following rejection of the Legislature's 1981 plans must be 'essentially different' from the rejected plans. Given the strong precedents in support of this position it would have been difficult to justify any other ruling on this point. However, any legislature elected from the rejected districts would have a vital stake in perpetuating districts which are essentially the same; and if the members of this panel really believed that the Legislature would give priority to their oaths to uphold the Constitution over political self-preservation, they were alone among observers of the reapportionment scene in this belief. Furthermore, Kramer v. Union School District (1969) 395 U.S. 621, 628 notes: 'The presumption of constitutionality [is not applicable] when the challenge to the statute [argues] that the institutions of state government are [not] structured so as to represent fairly all the people.' In Halliwell v. Eu it is not merely arguable that the Legislature does not fairly represent the views of the people of California on reapportionment, the referenda of June 1982 have proven that this is so."

15.06 Judge Karlton's eight-week delay in filing this order made it impossible for Plaintiff to proceed as the order suggests. At 11 Record 295

Plaintiff argues that this provision was unfair even when it was promulgated:

"Moreover, if Plaintiff had received the order of February 8 shortly after it was promulgated and thus had time to comply with its instructions, leave to supplement his complaint would have to have been 'freely granted'. In United States v. Reiten (1963) 313 F.2d 673, 675 the liberal policy of the Ninth Circuit regarding supplemental pleadings is discussed:

'[T]here is no reason to read into 15(d) an inflexible limitation upon the broad power vested in the District Court to permit supplemental pleading . . . . This interpretation of Rule 15(d) is supported by the general purpose of the Rules to minimize technical obstacles to a determination of the controversy on its merits.'

The whole purpose of pleading requirements is to provide notice of the nature of a legal claim, NOT TO ERECT HURDLES TO DELAY PROCEEDINGS. Since the defendants in this case are the very individuals enacting the legislation being challenged, it can hardly be said that they lacked fair notice as to what issues would be involved in new reapportionment legislation.

"Finally, if Plaintiff had anticipated the unanticipated development which required the Court's expedited consideration at a time when he could include them in a

supplemental pleading, there would have been no need to request time shortening. Thus it is difficult to see how a decision by a court to deny a motion for TIME SHORTENING can be fortified by Plaintiff's failure to PREVIOUSLY PETITION the Court for leave to supplement his complaint."

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judges Kennedy, Karlton and Ramirez

Item #16 (8 Record 117-128)

Filed April 19, 1983

On February 16, 1983, a hearing was held before the court regarding plaintiff's motions for a preliminary injunction, for reconsideration of Judge Karlton's order of July 1, 1982, and for the "recusal" of Judge Karlton, and separate motions brought on by defendant MARCH FONG EU, defendant in intervention ASSEMBLY OF THE STATE OF CALIFORNIA, and defendant in intervention SENATE OF CALIFORNIA to dismiss the complaint or certain claims therein. Plaintiff MICHAEL HALLIWELL appeared pro se; ANTHONY MANNESS appeared for defendant MARCH FONG EU; JOSEPH REMCHO and BARBARA BRENNER appeared for the ASSEMBLY: and ALLEN BROWNE, TERESA FERGUSON and BENJAMIN SCHEIBE appeared for the SENATE. After hearing, the court makes the following findings and orders:

Amidst the array of legal issues tendered to the court by these several

motions are some problems that appear to implicate fundamental constitutional doctrines and that also appear never to have been presented squarely to another federal court. These problems are sufficiently novel, subtle, and grave as to demand the most careful and thorough consideration by the court. On the other hand, both the nature of this specific case and the language of the statute empowering this court to act (see 28 U.S.C. § 2284) compel the court to dispose of the motions with dispatch. In an attempt to reconcile these contrary imperatives, the court will summarily dispose of those matters which permit of such treatment, and will take under advisement the balance of the matters tendered.

I

PLAINTIFF'S MOTION TO RECUSE JUDGE KARLTON

The plaintiff has moved to recuse

the Honorable Lawrence K. Karlton, to whom this case was initially assigned, from exercising what he terms "operational control" of this action. [Footnote: The court assumes that by "operational control" the plaintiff means the authority conferred by 28 U.S.C. § 2284 (b)(3): "A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided by this subsection...."] For the reasons set forth below, the plaintiff's motion is denied. The court will briefly address plaintiff's arguments seriatim.

First, the bias or prejudice upon which a motion to recuse must be based must be extrajudicial and cannot rest upon trial rulings or conduct, In re International Business Machines Corp., 618 F.2d 923 (2d Cir. 1980); United States v. Azhocar, 581 F.2d 735, 739 (9th

Cir.), cert. denied, 440 U.S. 907 (1979). Thus the plaintiff's displeasure with Judge Karlton's rulings does not provide a basis for his motion, even if those rulings were legally erroneous. Similarly, although the Federal Rules of Civil Procedure are to be construed to obtain substantial justice, and not to be used as traps for the unwary, the Rules cannot be disregarded entirely. The reluctance of the court to permit the plaintiff to disregard the rules does not warrant the recusal of Judge Karlton.[16.01] Finally, the refusal of Judge Karlton to permit the plaintiff to engage his law clerk in frequent and prolonged telephone conversations does not warrant Judge Karlton's disqualification. The law clerk is the judge's employee, and his first obligation is to the judge for whom he is employed. Fredonia Broadcasting Corp. v. RCA Corp.,

569 F.2d 251 (5th Cir.), cert. denied, 439 U.S. 859 (1978).[16.02]

The plaintiff next contends that Judge Karlton usurped functions of the full court by issuing certain orders governing procedure in the case. The statute clearly allows a single judge to enter such orders. The plaintiff's argument, that the substantive and procedural issues in the instant case are so intertwined that a single judge cannot act on any part of the case without violence to the intent of 28 U.S.C. § 2284(b)(3), is not persuasive. The plaintiff correctly contends that § 2284 contemplates that substantive decisions be made by three judges acting collegially. The court, however, rejects the plaintiff's contention that there is no valid distinction between the substantive and the procedural. Certainly the plaintiff has not demonstrated the impossibility of making

such a distinction on this record.[16.03] Furthermore, the court notes that 28 U. S.C. § 144 contains an explicit timeliness requirement. The plaintiff's motion was not timely, and is denied on that ground as well.[16.04]

II

PLAINTIFF'S MOTION FOR RECONSIDERATION

The plaintiff requests the full panel to reconsider Judge Karlton's July 1, 1982, order. Such a motion is clearly contemplated by 28 U.S.C. § 2284(b)(3), and is thus granted. Upon reconsideration, the court determines to reaffirm Judge Karlton's holdings, essentially for the reasons stated in the July 1 order.[16.05] Two of the issues raised by the plaintiff, however, warrant further discussion.[16.06]

First the plaintiff asserts that a wide range of claims that he wishes to assert, regarding the actions of the

California Supreme Court, are cognizable under the Guaranty Clause (U.S. Const. Art. IV, § 4).[16.07] As Judge Karlton held -- and as the courts have consistently affirmed -- to the extent that such claims derive solely from the Guaranty Clause they are 'not justiciable,' which is to say not cognizable in the federal courts. See, e.g., Baker v. Carr, 369 U.S. 186, 218 (1962); O'Hair v. Hill, 641 F.2d 307, 310 (5th Cir. 1981); Davids v. Akers, 549 F. 2d 120, 126 (9th Cir. 1977). It is true that a few courts have suggested in dicta that "[s]omeday, in certain circumstances, the judicial branch may be the most appropriate branch of government to enforce the Guaranty Clause." Kohler v. Tugwell, 292 F. Supp. 978, 985 (E.D.La. 1968, three-judge court, Wisdom, J. concurring), aff'd, 393 U.S. 531 (1969) (per curiam); quoted in Byrd v. City of San Antonio,

587 F.2d 184, 186 (5th Cir. 1979), cert. denied, 444 U.S. 829 (1979). Even commentators calling for sweeping judicial intervention in state affairs on the basis of the Guaranty Clause, however, concede that the law does not presently permit the adjudication of "claims that the structure of public decisionmaking should be altered to conform it to some concept of republicanism." Note, A Niche for the Guarantee Clause, 94 Harv. L. Rev. 681, 687 (1981). It is just such claims that the plaintiff seeks to litigate in this case.[16.08]

Second, plaintiff's most strenuously asserted claims derive from what he perceives to have been invidious discrimination against him and others similarly situated as members of the Republican Party. There is certainly something to be said for the notion that the Equal Protection Clause protects members

of minority political groups from intentional discrimination in the reapportionment process. Indeed, the existence of such a claim has been endorsed by several commentators (see, L. Tribe, American Constitutional Law, 756-61 (1978); J. Jodge and P. McCauley, Reapportionment: A Survey of the Practicality of Voting Equality, 43 U. Pitt. L. Rev. 527, 568 and n. 163 (1982); Comment, Constitutional Challenges to Gerrymanders, 45 U.Chi.L.Rev. 845 (1978)) and at least one sitting Justice of the United States Supreme Court (see, City of Mobile v. Bolden, 446 U.S. 55, 86-87 (1980) (Stevens, J. concurring); see also, United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144, 167 (1977) (opinion of White, J.)).

The fact remains, as the plaintiff candidly concedes, that no federal court has ever held a reapportionment plan

unconstitutional on the basis of partisan gerrymandering. See, S. Bickerstaff, Reapportionment by State Legislators: A Guide for the 1980's, 34 Southwestern L. J. 608, 653-54 (1980).[16.09] In fact, every court that has faced the question squarely has refused to recognize such a claim.[16.10] See, e.g., Russo v. Vacin, 528 F.2d 27 (7th Cir. 1976); Jimenez v. Hidalgo County Water Improvement District No. 2, 68 F.R.D. 668 (S.D. Tex. 1975) (three-judge court), aff'd. 424 U. S. 950 (1976) (per curiam); WMCA, Inc. v. Lomenzo, 238 F.Supp. 916 (S.D.N.Y.), (three-judge court), aff'd, 382 U.S. 4 (1965) (per curiam). Moreover, four justices of the Supreme Court recently rejected the principle that discrimination against political groups in the context of electoral representation is sufficient to raise an Equal Protection claim. City of Mobile, 446 U.S. at 79-

79 (plurality opinion), quoting Whitcomb v. Chavis, 403 U.S. 124, 156-57 (1971).[16.11]

In light of this overwhelming authority, this court cannot hold that the Equal Protection Clause supports plaintiff's political gerrymandering claims. Rather, the court accept the fact that where the apportionment process is committed to a political body, the process will likely be colored by partisan considerations. Partisan politics cannot properly be viewed as a taint on an otherwise pure system of self-governance. On the contrary, our political system is by design a continuing struggle between powerful political adversaries: in short, it is essentially partisan in character. The courts have not been delegated the role of referees to ensure that the immediately dominant party does not press its advantage to

the full, if it does so in an otherwise lawful manner.

This is not to say that the reverse is true, i.e. that the state may tender a partisan purpose as its legal justification for its unequal treatment of its citizens. Nor may a stage impinge on the fundamental rights of its citizens without having to withstand the closest scrutiny by the courts. See, City of Mobile, 446 U.S. at 76 (plurality opinion). There is not, however, any fundamental right to proportional representation based on political affilation.[16.12] Id. So long as an apportionment plan does not otherwise offend the Constitution, the mere fact that the plan is designed to the disadvantage of a minority political party is not a basis in and of itself for barring the use of that plan.

III

THE SECRETARY OF STATE'S MOTION TO DISMISS

Defendant MARCH FONG EU is sued herein in her capacity as California's Secretary of State. She has maintained throughout the course of this litigation that she is not the proper party defendant to an action challenging the apportionment of state electoral districts. She argues, in essence, that her role in the state's electoral process is purely ministerial and she lacks the authority to implement any remedy that this court might afford the plaintiff, such as an order mandating new elections.

The right of action against a state for alleged unconstitutional malapportionment of voting districts necessarily implies that there is some official who properly can be named as a defendant to represent the interests of the state. The Secretary has not persuaded this

court that California has delegated that burden to any other state official. We note that historically the Secretary of State of the challenged state has been a party, if not the party defendant to a voting rights suit. See, e.g., White v. Weiser, 412 U.S. 783 (1973); Kirkpatrick v. Preisler, 394 U.S. 526 (1969). Such was the case in the last major federal court challenge to an apportionment plan adopted by the California Legislature. Silver v. Jordan, 263 F. Supp. 627 (C.D. Cal. 1966) (three judge court). Most important, as a matter of California constitutional law, "as the reapportionment cases themselves indicate, it is the general and long-established rule that in actions for declaratory and injunctive relief challenging the constitutionality of state statutes, state officers with statewide administrative functions under the challenged statute

are the proper parties defendant." Serrano v. Priest, 18 Cal. 3d 728, 752 (1976). It thus appears that the Secretary of State is the proper defendant to this lawsuit, in that she "is the chief election officer having statewide functions with respect to the election of state [legislators]." Yorty v. Anderson, 60 Cal. 2d 312, 317 (1963). The Secretary does not suggest that there is a principled distinction to be drawn where, as in this suit, the challenge is immediately directed against a plan adopted by the state's highest court, rather than by the state legislature. Accordingly, the motion to dismiss is denied.

IV

THE MOTION TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTIES

At the express invitation of the court, counsel for the defendant in intervention ASSEMBLY has brought on a

motion to dismiss the plaintiff's claims regarding the drawing of congressional districts. The basis for the motion is that the plaintiff has failed to join parties indispensable to the action under Fed.R.Civ.P. 19, i.e. the members of California's congressional delegation. Despite counsel's splendid exegesis on Rule 19, the court concludes that this motion must be denied.

In the final analysis, the court must acknowledge the apparent fact that no action challenging the apportionment of electoral districts has ever been dismissed on this ground. Indeed, counsel conceded the novelty of this attack at oral argument. As noted above, the defense of every such voting rights case has been entrusted to the respective Secretary of State or comparable state officer. See also, Wells v. Rockefeller, 394 U.S. 542 (196) (Governor of New York

named as defendant). Thus it may be surmised that the representatives sitting in the challenged districts, while they may be proper parties to the action, are not indispensable to its disposition.

The court must confess to some discomfort with this mode of analysis by negative inference. In the present context, though, the inference is strong. The fact that no action has been dismissed for failure to join the affected representatives cannot merely be ascribed to the attorneys' neglect timely to raise the issue. The defense is not waived by a failure to raise it at the inception of proceedings before the trial court. Fed.R.Civ.P. 12(h). The issue may even be raised for the first time on appeal. Continental Ins. Co. of New York v. Cotten, 427 F.2d 48, 51 (9th Cir. 1970). Moreover, in this circuit at least, the lack of an indispensable

party is viewed as a matter that divests the court of jurisdiction. Id.; contra, 5 C. Wright & A. Miller, Federal Practice & Procedure §1359 at 630-31 & n.88 (1969). It is therefore the duty of the court, at any stage of the litigation, to raise the issue on its own motion. Continental Ins. Co., supra. Given this analysis, the fact that the issue was not raised by other courts -- including the United States Supreme Court -- under similar circumstances impels us to conclude that those courts did have jurisdiction over the cases before them, despite the absence of the sitting representatives.

It is true that the question of whether or not a given party is "indispensable" to an action turns on the particular facts facing the court. United States v. Navajo Freight Lines, 525 F.2d 1318, 1322 (9th Cir. 1975). Nonetheless

we cannot discern any relevant distinction between the case at bar and those similar apportionment cases in which the Supreme Court implicitly affirmed its own jurisdiction in the manner charted above. Accordingly, it appears that this court is not divested of jurisdiction over the action by reason of the plaintiff's failure to join the congressional representatives. The motion to dismiss on this ground is therefore denied.

V

THE REMAINING PENDING MOTIONS

The defendant in intervention SENATE OF THE STATE OF CALIFORNIA has brought on a motion to dismiss the plaintiff's claims relating to the reapportionment of that body, and the plaintiff has moved for a preliminary injunction ordering the unseating of three state senators and the holding of special

elections in three senatorial districts designated by the plaintiff. The court elects to take both matters under further advisement.[16.13]

VI

The defendant in intervention ASSEMBLY has filed a motion for summary judgment,[16.14] and the plaintiff previously filed a motion seeking a preliminary injunction that would require the state to hold special elections in all disputed electoral districts. The parties are directed to file briefs in opposition to these motions, or letters stating that they do not oppose said motions, within twenty (20) days from the effective date of this order. The moving parties may file briefs in reply to any such oppositions within thirty (30) days of the effective date of this order. Upon receipt of all briefs, the court will determine whether oral argument is appropriate, or

whether the matter should be taken under advisement on the papers submitted. See E.D. Cal. Rule 113(g); Morrow v. Topping, 427 F.2d 1155, 1156 (9th Cir. 1971).

IT IS SO ORDERED.

/s/ Anthony M. Kennedy, Judge
United States Court of Appeals

/s/ Lawrence K. Karlton, Chief Judge
United States District Court

/s/ Raul A. Ramirez, Judge
United States District Court

Dated: April 13, 1983

Plaintiff's Contextual Footnotes:

16.01 Plaintiff responds at 17 Record 82: "At no time in these proceedings has Plaintiff knowingly violated the rules. Those errors that Plaintiff may have made were due at least in part to Judge Karlton's policy of no communication (his August 9, 1982 ban on contacting any member of his staff) and no clarification ('I keep telling you I can't be your lawyer, Mr. Halliwell,' December 6, 1982 status conference transcript at 18). When Plaintiff protested that Judge Karlton has in fact disregarded the rules (2 Record 304-317 and 4 Record 30-38), those protests also were ignored."

16.02 Plaintiff responds at 11 Record 315-317:
"The facts of this situation are these: (1) A prolonged telephone conversation did take place on April 1, 1982, when arrangements were made for the April 14, 1982 TRO hearing. (2) Plaintiff made several short calls between the TRO hearing and the May 3, 1982 status conference to protest the Secretary of State's mailing of her brief so that it reached plaintiff on the day after the TRO hearing; the Court's insistence that plaintiff repeatedly serve summons on defendant, who had plainly been adequately summoned; and the Court's refusal to act on plaintiff's motions to expedite

consideration. (3) Plaintiff called regarding the revocation of his stipulations on the next business day after the June 11, 1982 hearing, but the conversation was brief, as the law clerk told plaintiff to file a written statement and serve it on the parties. (4) Between the time the stipulation revocation was returned with the filing stamp painted out and the time plaintiff attempted to file his plea for expedited consideration and supplemental memorandum on standing two calls were made but not returned. (5) Shortly after receiving the Order of July 1, 1982 plaintiff attempted to determine the appealability of the Order; the conversation was brief, since the law clerk simply referred plaintiff to the provisions of the Order. (6) When the 30-day period for the filing of appeals was about to expire plaintiff called at a time when Judge Karlton and the law clerk handling Halliwell v. Eu were at a Ninth Circuit conference. Plaintiff had a long and very helpful conversation with Judge Karlton's other law clerk about various aspects of applicable procedures. (7) Shortly after receiving the Senate's motions of July 21, 1982 and August 4, 1982, both (apparently inappropriately) directed to Judge Karlton as a single judge, plaintiff called in unsuccessful attempts to determine the status of these motions. (8) On August 9, 1982 plaintiff called to inquire about a list of locations where the

Local Rules of the Ninth Circuit were available. The law clerk called back to inform plaintiff that any further contacts with Judge Karlton's staff had been enjoined on the grounds that Judge Karlton considered phone calls of the sort plaintiff had made to his secretary and law clerks to be impermissible ex parte communications.

"Furthermore, the Order of April 19, 1983 cites Fredonia Broadcasting Corp. v. RCA Corp. supra as authority for the proposition that "The law clerk is the Judge's employee, and his first obligation is to the Judge for which he is employed", but in fact Fredonia simply states:

> 'The impartiality of a trial judge is seriously open to question when the judge refuses to recuse himself after being made aware that his former law clerk is actively involved as counsel for a party in a case in which the law clerk participated during his clerkship.' Id. at 256."

16.03 Plaintiff responds at 11 Record 321-322:

"Plaintiff's actual position with regard to the relationship of substantive and procedural issues is set forth at 7 Record 516:

> 'Plaintiff contends that the delegation of procedural matters is inappropriate when procedural rulings have a decisive impact on plaintiff's

> ability to secure an adjudication of his claims on their merits. The provisions of 28 U.S.C. § 2284 clearly require any judgment on the merits to be made by three judges. It therefore follows that procedural rulings, such as the scheduling of hearings which foreclose a decision on the merits until potential remedies lose their feasibility, should likewise be made only by three judges.'

There certainly is a valid distinction between the substantive and the procedural; in fact, Congress has carefully designed the Federal Rules of Civil Procedures to preclude procedural maneuvering rather than substantive merit from deciding cases. Only 'frivolous' or 'essentially fictitious' claims may be peremptorily dismissed; in all other cases the issues must be decided on the proofs, not the pleadings. On April 19, 1983, FOURTEEN MONTHS had passed without a single issue in Halliwell v. Eu having been decided on the merits; one can hardly imagine a course of procedural conduct wherein the substantive aspects of the case have been more totally submerged."

16.04 Plaintiff responds at 11 Record 322-323:

"But plaintiff had made it unequivocally clear that his motion was not to disqualify Judge Karlton from the case and that his motion was therefore not brought under

28 U.S.C. § 144. Footnote 1 of the Order recognizes that plaintiff's motion was brought under 28 U.S.C. 2284(b)(3). The portion of this subsection on which plaintiff bases his motion is 'Any action of a single judge may be reviewed by the full court at ANY time before final judgement.' Emphasis added. Fourteen months of procedural nit-picking and inaction on a redistricting case while the affected elections come and go is certainly subject to review by the full court in view of the expedited hearing requirement of 28 U.S.C. § 2284 (b)(2)."

16.05 Plaintiff responds at 7 Record 74-75:

"The order of April 19 ignores the reconsideration motions which had actually been briefed and rules instead on the August 1982 motion, which had limited itself to 33 cases cited by Judge Karlton in his order of July 1, 1982. This is an important distinction because the reconsideration proposals filed on January 7, 1983 focussed individually on each of the three claims totally excluded by Judge Karlton. (i) Judge Karlton's dismissal of all state-law claims on jurisdictional grounds (even though rights under state law were abrogated on federal grounds by the California Supreme Court) was analyzed by Plaintiff at 7 Record 68-86. (ii) Judge Karlton's ruling out of all Due Process claims on grounds of standing (flatly con-

trary to Warth v. Seldin (1975) 422 U.S. 490, 504-505: 'The fact that the harm to petitioners may have resulted indirectly does not in itself preclude standing.') was analyzed at 7 Record 87-98. (iii) Judge Karlton's elimination of the ethnic gerrymandering aspect of the case on account of the color of Plaintiff's skin (notwithstanding the right of whites recognized in Taylor v. Louisiana (1975) 419 U.S. 522, 527 to challenge racial discrimination which is 'at war with our basic concepts of a democratic society and a representative government') is analyzed at 7 Record 99-105.

"In spite of the numerous Supreme Court precedents cited by Plaintiff in support of these excluded claims, the order of April 19 says nothing at all about these claims."

16.06 Plaintiff responds at 11 Record 324-325:

"The two issues deemed worthy of discussion, partisan gerrymandering and Guaranty Clause claims, are the two where plaintiff has conceded that Judge Karlton's positions may be defensible in view of the poorly developed state of the law in these areas. By avoiding discussion of plaintiff's four strongest challenges to the Order of July 1 the full Court continues a pattern of avoidance of the most embarrassing aspects of Judge Karlton's conduct.

"The failure of the full Court

to discuss a rationale for allowing ANY dismissals without leave to amend is unjustified in view of the fact that none of the 33 cases on which Judge Karlton had relied for these dismissals had been included in defendants' supporting briefs (see 4 Record 77). The obligation of the full Court to give reasons for its blanket affirmation of the dismissals without leave to amend has been explicitly affirmed:

> 'The basic principle of Rule 15(a), Fed.R.Civ.P., is that leave to amend a pleading "shall be freely given when justice so requires." The mandate of the rule must be heeded. Furthermore, leave to amend may not be denied without stating a reason for such denial, even though granting leave is within the discretion of the trial court. Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962).' Monarch Industrial Corp. v. American Motorists Ins. Co. (1967) 276 F.Supp. 972, 981."

16.07 Plaintiff quotes (at 16 Record 299-301) his prior explanations of his Guaranty Clause claims:

"Proponents of redistricting reform in California have done everything possible to preserve their political rights. The passage of Proposition 6, which became Article XXI, was followed by the investment of one million dollars and untold effort to develop thor-

oughly documented redistricting plans which implement Article XXI and to defend these plans at public hearings. The effort continued with a very thorough analysis of the Legislature's redistricting plans which demonstrated their blatant unconstitutionality and challenges to these plans which were presented to the California Supreme Court. The effort to see that Article XXI of the State Constitution was honored even though the Legislature's redistricting plans ignored it also included a massive petition drive which secured 2-1/2 times the necessary number of signatures needed to block the Legislature's plans till they had been approved by a referendum. The State Supreme Court overruled the State Constitution by ordering into effect these districts which had thus been blocked.

"The voters of California resoundingly rejected these districts in the referendum. Thus though every political avenue was exhausted and the reformers clearly won according to the established rules, the California Supreme Court decision robbed the reformers of their victory. They turned to the federal courts for redress; but in all of these federal suits consideration of the merits has been totally avoided.

"The last line of defense for the rule of law is the Guaranty Clause of the United States Constitution." Id. at 151-152.

"In mandating the adoption of redistricting plans which have been

blocked by referendum the California Supreme Court has violated the primary attribute of republican government set forth in Chisholm v. Georgia (1793) [2 U.S. 419, 457]: 'one constructed on the principle that supreme power resides in the body of the people.' In ignoring the constitutional defects of the redistricting plans which it orders into effect the California Supreme Court has brazenly transgressed the principles of the rule of law set forth in Marbury v. Madison (1803) [5 U.S. 137, 178]. The majority of the court has indeed 'closed their eyes on the Constitution,' but instead of seeing only the law the majority has seen only deference to a Legislature and a Governor of their own party. The majority of the Court has indeed 'subverted the very foundation of all written constitutions' and allowed 'the legislature to do what is expressly forbidden' in Article XXI, notwithstanding the express prohibitions of Article II Sections 9 and 10. In making the partisan gerrymandering of California's legislative districts 'in reality effectual' the majority of the Court has 'given to the legislature a practical and real omnipotence.'" Id. at 150-151.

"At 11 Record 593-595 Plaintiff has summarized the severe damage which has been inflicted on California's institutions of representative democracy:

> 'The Democratic Party has declared all-out war on the

State Constitution to protect its redistricting. . . . So far in this all-out war the Democratic Party, with the support of its top officials in executive, legislative and judicial branches of California's state government, has abrogated (1) the initiative of Article II § 8, (2) the referendum of Article II §§ 9 and 10, (3) the anti-gerrymandering protections of Article XXI, (4) the requirement of Article IV § 6 that "Each senatorial district shall choose one senator," (5) the provision of Article I § 3 that "The people have the right to instruct their representatives," (6) the provision of Article II § 1 that "All political power is inherent in the people . . . . they have the right to alter or reform it when the public good may require." and impaired numerous other provisions of the California Constitution.

'In these circumstances the Guaranty Clause of Article IV § 4 of the United States Constitution is clearly applicable.'" Id. at 154."

16.08 Plaintiff responds at 16 Record 442-443:

"This second line of attack on Plaintiff's Guaranty Clause claim also misses the mark, since there is nothing at all in Plaintiff's

briefing or elsewhere which supports such a characterization of Plaintiff's Guarantee Clause claim; and indeed the order does not supply any specifics to justify its characterization.

"The Court's determination to adhere to its own suppositions regarding Plaintiff's Guaranty Clause claim is clearly shown by the repeated refusal of the Court to allow Plaintiff to explain it in oral argument: Judge Karlton disallowed any discussion of Plaintiff's Guaranty Clause claim at the June 11, 1982 hearing (Transcript at 38), and when Plaintiff later asked the full panel to reconsider Judge Karlton's exclusions, Judge Kennedy replied at the October 27, 1982 hearing: 'I'm not sure that you are particularly well advised to talk about the dismissals without leave to amend.' Transcript at 7.

"In supplemental briefing called for by the order of April 19, 1983 Plaintiff points out that the Court's interpretation of Plaintiff's Guaranty Clause claim is the reverse of what Plaintiff in fact alleges to be a violation of the Guarantee Clause:

> 'Plaintiff, along with the minority of the California Supreme Court, has alleged that the majority in Assembly v. Deukmejian has restructured public decisionmaking in California by abrogating referendum stay provisions. See 3 Record 177. In his dissenting

opinion (30 Cal.3d at 681-682) Justice Richardson [supported by Justices Mosk and Kaus] notes:

> "The majority finds it anomalous that a 'mere' 5 percent of the voters can effectively postpone the Legislature's reapportionment plan. The answer, of course, is that this was the people's own decision to fix the qualifications at 5 percent. In actuality the signatures were in excess of 12 percent and these were speedily obtained. . . . The majority's quarrel on this score is more appropriately directed to the framers of the State Constitution and to the people themselves who, in adopting the provision, authored the dual protections of gubernatorial veto and referendum stay as safeguards against legislative abuses." 3 Record 177-178.' 8 Record 297-298."

16.09 Plaintiff responds at 11 Record 331-332:

"Even if this were still true, a litigant does not need a precedent squarely supporting his position to avoid dismissal of a claim at the pleading stage. However, in Farnum v. Burns II (1983) 561 F.Supp. 83 a

federal court struck down a state legislative redistricting plan solely on the grounds of partisan gerrymandering. See 8 Record 459-468. This precedent is especially applicable to Halliwell v. Eu since the federal court acted in its exercise of pendent jurisdiction over an anti-gerrymandering provision of the Rhode Island Constitution which is similar to California's Article XXI."

16.10 Plaintiff notes at 16 Record 298: "The High Court has since supported Plaintiff's reliance on Gaffney v. Cummings and squarely rejected the interpretation of this case by the District Court. According to Davis v. Bandemer (1986) 106 S.Ct. 2797, 2807 'the political gerrymandering claim in this case is justiciable,' and 'As Gaffney [412 U.S. at 751-752] demonstrates, that the claim is submitted by a political group, rather than a racial group does not distinguish it in terms of justiciability.' Id. at 2806."

16.11 Plaintiff responds at 11 Record 335:
"The Mobile v. Bolden reference is unclear because it quotes no language and there is a typographical error in the page citation. The supporting reference to Whitcomb v. Chavis merely denies a right to proportional representation, and nothing in the Bolden opinion goes beyond this. There is, however, a portion of this opinion which makes it clear that the acceptability of

disproportionate representation does not make acceptable 'discrimination against groups.

'It is for the states "to determine the conditions under which the right of suffrage may be exercised . . . absent of course the discrimination which the Constitution condemns." [Citations.]' 446 U.S. at 76-77."

16.12 Plaintiff responds at 17 Record 77: "Plaintiff has never based his partisan gerrymandering claim on proportional representation. He has assumed the affirmative burden of proving systematic dilution of Republican voting power by means of model plans which maximize compliance with redistricting policy established in Article XXI of California's Constitution, see 5 Record 284-296, and by means of offering the Court judicially manageable standards derived from prior gerrymandering litigation, see 8 Record 314-509."

16.13 Plaintiff responds at 17 Record 72: "The order of April 19 gives no rationale at all for taking the Senate's jurisdictional challenge under further advisement. The Court's alleged lack of jurisdiction was the lynch-pin of the Senate's refusal to provide population data sought by Plaintiff, as its counsel notes in her status

report prior to the December 6, 1982 status conference: 'As the Senate of the State of California contends that . . . this court lacks subject matter jurisdiction, it contends that no discovery should be permitted.' (6 Record 33.) The delay in ruling on the Senate's jurisdictional challenge was of critical importance because Plaintiff was never allowed discovery to obtain the necessary data, and in the Court's next order Plaintiff's use of population statistics 'too imprecise to be accorded any meaning' was cited as grounds for dismissing his senate claim. See 12 Record 238."

16.14 Plaintiff responds at 17 Record 73-74:

"The order of December 16, 1982 had insisted: 'All [motions] shall be submitted according to the following schedule [not later than January 7, 1983], and only according to that schedule.' (6 Record 275.) The same order also provides, 'All decisions regarding other matters in this case are now deferred pending disposition of the motions to be heard by the Court on February 16, 1983.' (6 Record 276.) The order of February 8, 1983 absolutely barred any motions outside the framework of the order of December 16, 1982: 'At the status conference conducted by the Honorable Lawrence K. Karlton on December 6, 1982, a schedule for the hearing of all motions was discussed and ordered.

This schedule prevails over Local Rule 113.' (7 Record 526.)

"Nevertheless, after the February 16, 1983 hearing the Assembly filed an out-of-season motion for summary judgment in direct violation of the prohibitions of the filing of any such motions by the orders of December 16 and February 8. The order of April 19 ignores the circumstances of the filing of the Assembly's summary judgment motion, saying only that 'The defendant in intervention ASSEMBLY has filed a motion for sxmmary judgment' (8 Record 127) and calling for briefing on the same schedule as established for Plaintiff's preliminary injunction motion.

"The Court's acceptance of this motion gave the Assembly an unfair advantage. Plaintiff continued to adhere to the Court's filing restrictions and therefore filed no countermotion to the Assembly's out-of-season summary judgment motion, and thus the Assembly had the last word in filing rebuttal on its summary judgment motion after Plaintiff had filed his opposition. The Assembly waited until this rebuttal to make a number of factual misrepresentations which Plaintiff had no opportunity to point out to the Court. Thus a seemingly minor procedural favoritism came to play a critical role in the Assembly's securing a summary judgment based on these factual misrepresentations. Moreover, under the terms

of the Court's instructions deferring ruling on discovery until after ruling on dismissal, Plaintiff's right to discovery also was sabotaged. See Plaintiff's memorandum on status of the case at 14:24-18:5 (16 Record 368-372)."

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judges Kennedy, Karlton and Ramirez

Item # 17 (12 Record 46-47)

Filed February 6, 1984

Plaintiff has requested an immediate Status Conference in order to "expedite proceedings in the case."

The undersigned judges currently have under advisement defendant in intervention SENATE OF THE STATE OF CALIFORNIA's motion to dismiss plaintiff's claims relating to the reapportionment of that body, and plaintiff's motion for a preliminary injunction seeking to unseat three state senators, and hold special elections.[17.02] In light of these pending motions, it would be ill-advised to hold a Status Conference at this time. Plaintiff, in his motion, and the accompanying "Supplemental Memorandum on the Refusal of the Ninth Circuit to Adjudicate Federal Challenges to the Redistricting Plans adopted in Assembly v. Deukmejian," does not seek to explain why a Status Conference at this time would serve a useful pur-

pose.[17.02]

Plaintiff's motion requesting an immediate Status Conference is therefore DENIED.

IT IS SO ORDERED.

/s/ Anthony M. Kennedy, Judge
United States Court of Appeals

/s/ Lawrence K. Karlton, Chief Judge
United States District Court

/s/ Raul A. Ramirez, Judge
United States District Court

Dated: February 1, 1984

Plaintiff's Contextual Footnotes:

17.01 These motions were filed on January 7, 1983 and argued on February 16, 1983.

17.02 Plaintiff cites (at 17 Record 102-103) the grounds for his status conference request:

> "In his January 15, 1984 'Supplemental Memorandum on the Refusal of the Ninth Circuit to Adjudicate Federal Challenges to the Redistricting Plans Adopted in Assembly v. Deukmejian' Plaintiff protests
>
> > 'judicial misconduct [which] so impairs public confidence in the fairness of the judicial process that the courts can no longer command the public respect they need in order to effectively perform their vital functions. The sacrifice [in Assembly v. Deukmejian] of constitutionally conducted elections to avoid the reprogramming of computers at "the extremely high cost of adding staff to cut production time" followed by this court's refusal to block implementation of the contested districts after they had been resoundingly rejected in referenda (in direct defiance of the unanimous mandate of the U.S. Supreme Court directed at the Ninth Circuit [in 73 L.Ed.2d 245] that dispositive state law issues must be considered under pendent jurisdiction), followed by the refusal of this and two other

> federal courts [in Chavez v. Eu and Richardson v. Eu] to adjudicate so clear-cut a constitutional issue as the disenfranchisement of some senate districts so that other districts may be provided with double representation, followed by the calling of an illegal special session at which an illegally elected legislature and a lame-duck governor froze the contested districts into place with an illegal urgency clause which blocked any further referendum challenge, followed by abrogation of the initiative and the cancellation of a duly scheduled election by the California Supreme Court [in Legislature v. Deukmejian], followed by such protracted delay by this court that the "run-out-the-clock" strategy which destroyed the integrity of California's 1982 congressional and state legislative elections now threatens to thwart adjudication of the constitutionality of California's 1984 elections for these same offices, has completely subverted the legitimacy of the state politics of a state which was once foremost in the nation in the reputation for fairness of its electoral process.' (11 Record 591-592.)

"Plaintiff accompanied this protest with a 'Motion Requesting Status Conference' which urged:

> 'PLAINTIFF URGENTLY REQUESTS THAT A STATUS CONFERENCE BE

HELD AT THE EARLIEST POSSIBLE DATE TO EXPEDITE PROCEEDINGS IN THE CASE. TIME IS RUNNING OUT FOR PROVIDING EFFECTIVE RELIEF AFFECTING THE 1984 ELECTIONS.' (11 Record 593.) Emphasis in original."

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judges Kennedy, Karlton and Ramirez

Item #18 (12 Record 234-255)

Filed March 27, 1984

The motion of defendant-in-intervention Senate for dismissal and the motion of plaintiff Halliwell for a preliminary injunction came on specially for hearing on February 16, 1983. Plaintiff appeared pro se; defendant Eu appeared by her counsel, Richard B. Maness, Esq.; defendants-in-intervention Assembly, et al., appeared by its counsel, Joseph Remcho, Esq., and Barbara Brenner, Esq.; defendant-in-intervention Senate appeared by its counsel, Allan Browne, Esq., Benjamin Scheibe, Esq., and Teresa Ferguson, Esq. The motions were argued and submitted to the court for adjudication.

Also before the court for adjudication are defendants-in-intervention Assembly's motion for summary judgment and plaintiff's motion for a preliminary injunction requiring special interim elections throughout the State of

California on November 8, 1983. Having considered all memoranda of points and authorities submitted by the parties in accordance with the court's Order of April 19, 1983, the court now determines that oral argument is unnecessary. Accordingly, Assembly's motion for summary judgment and plaintiff's motion for a preliminary injunction are ordered submitted on the moving papers.[18.01] E.D. Cal. Local Rule 113(g); Morrow v. Topping, 427 F.2d 1155, 1156 (9th Cir. 1971).

THE SENATE'S MOTION TO DISMISS

The Senate has moved to dismiss plaintiff's complaint insofar as it challenges the districts from which the members of the Senate were elected. A generous reading of the plaintiff's second amended complaint admits of two challenges to the Senatorial districting: an allegation of an unconstitutional

deviation from the norm of equal population distribution among districts, and an allegation of an unconstitutional renumbering of the districts. [Footnote: The court notes that the absence of any discernible state claims precludes the possibility of "Pullman abstention." See Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). We recognize that such abstention may be appropriate where state claims are presented which might avoid or alter the federal constitutional questions, and where a party has moved for such abstention. Badham v. United States District Court for the Northern District of California, 721 F.2d 1170 (9th Cir. 1983). Such a situation is not presented here.] The Senate demurs to both of these arguments on the grounds that (1) plaintiff lacks standing to assert the challenge; (2) plaintiff is collaterally estopped to

challenge the Senatorial districts by virtue of his participation in Assembly v. Deukmejian, 30 Cal.3d 638, appeal dismissed sub nom. Republican National Committee v. Burton, ___ U.S. ___, 102 S.Ct. 2003 (1982); (3) comity between federal district courts requires dismissal; (4) comity between federal and state courts requires dismissal; and (5) the plaintiff has failed to state a claim upon which relief can be granted. Because the court is persuaded that plaintiff has failed to state a cause of action upon which relief can be granted, the court will dismiss plaintiff's claims which address the Senatorial districts. F.R.Civ.P. 12(b)(6). The court intimates no view on the merits of the Senate's remaining grounds for its motion.[18.02]

I

UNEQUAL POPULATION DISTRIBUTION

Plaintiff's second amended complaint with respect to the allegation of an unconstitutional deviation from the norm of equal population distribution among districts alleges as follows:

> The Senate has not provided a detailed population breakdown, so a precise analysis of Senate district populations is not possible unless one is prepared to accept unverifiable population claims of proponents of the Senate plan. However, a 1% deviation from the ideal Senate district population involves an over-representation by a margin of 6,000 people, and half of the Senate districts have population imbalances greater than this: a clear violation of the one person, one vote principle. This violation is aggravated by the fact that the population disparities are applied in a discriminatory manner so that most districts with Democratic incumbents have smaller populations than districts with Republican incumbents.

Plaintiff's Second Amended Complaint, pg. 4, lines 9-20, footnotes omitted.

The question now presented to the Court

is whether these allegations, if proven, are sufficient to entitle plaintiff to the relief he seeks.

For reasons as set forth herein, the Court answers this inquiry in the negative. Brown v. Thomson, 51 U.S.L.W. 4883 (U.S. June 22, 1983); White v. Regester, 412 U.S. 755 (1973). The United States Supreme Court has repeatedly held that state apportionment schemes need not conform as strictly to the standard of absolute population equality as congressional apportionment plans. Brown v. Thomson, supra; White v. Regester, supra; Gaffney v. Cummings, 412 U.S. 735 (1973); Mahan v. Howell, 410 U.S. 315 (1973); cf., Karcher v. Daggett, 51 U.S.L.W. 4853 (U.S. June 22, 1983). The Court has gone even further and held that a total maximum deviation from the ideal district of less than 10% does not state a claim for relief under

the Fourteenth Amendment. See White v. Regester, supra.

Pursuant to the authorities cited herein, the plaintiff's complaint is clearly insufficient. Stripped to its essentials, the complaint merely alleges that half the Senatorial districts deviate from the ideal Senatorial district by an amount greater than 1%. An allegation to the effect that the deviation is greater than 1% is, obviously, too imprecise to be accorded any meaning; reading the complaint to allege deviations of precisely 1% means that the plaintiff has failed to allege a deviation in sufficient degree to state a claim for relief.

Two additional observations must be made. The first of these is that the plaintiff's allegation that the apportionment plan discriminates against Republicans avails him nothing. There is

no authority for the propostion that a reapportionment plan that discriminates on the basis of political party offends the Equal Protection Clause.[18.03] Dicta to the contrary notwithstanding, the United States Supreme Court has never invalidated an apportionment plan that reflected the majoritarian party's exercise of its superior power. The Supreme Court has invalidated only those apportionment plans which neutralize or exclude racial or ethnic minority groups.[18.04] Rogers v. Lodge, ___ U.S. ___, 102 S.Ct. 3272 (1982); City of Mobile v. Bolden, 446 U.S. 55, 66 (1980); White v. Regester, supra; Whitcomb v. Chavis, 403 U.S. 124 (1971). See Fortson v. Dorsey, 379 U.S. 498 (1965). In fact, precedent suggests that the Supreme Court is not opposed to quintessentially political conduct being enlivened by partisan considerations:

> It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. . . . Politics and political considerations are inseparable from districting and apportionment. . . . District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.

Gaffney v. Cummings, 412 U.S. at 752-53. Thus the plaintiff's complaint that the challenged plan disadvantages Republicans does not state a claim upon which relief can be granted.

The second necessary observation is that no special scrutiny of the plan is required because it was adopted by the California Supreme Court. The cases relied upon by the plaintiff for the proposition that a court-ordered reappor-

tionment plan must be evaluated by stricter standards than those used to evaluate a legislative reapportionment are inapposite. In each case, the Court was addressing the scope of discretion of the federal district court in fashioning an apportionment scheme for a state legislative house. Connor v. Finch, 431 U.S. 407 (1977); Chapman v. Meier, 420 U.S. 1 (1975).[18.05] The relationship of a federal district court to a state is quite different from the relationship of the state's highest court to the state. The court assumes that the state's highest court is far better equipped to identify and to implement competing state interests[18.06] than is the federal district court; thus the rule that court-ordered apportionment plans are subject to severe constraints has no application to apportionment plans adopted by the state's highest court.

Under ordinary circumstances this court would give the plaintiff leave to amend his complaint to allege sufficient disparity between the actual and the ideal to state a claim for relief. In this case, however, the court is satisfied that amendment would constitute an idle act.[18.07] For that reason, leave to amend will be denied, and the plaintiff's complaint, insofar as it addresses the apportionment of the Senatorial seats, will be dismissed with prejudice.

The plaintiff's complaint is far from clear about the relief sought by this action. Cf, F.R.Civ.P. 8(a). The court is satisfied that no retroactive relief is warranted, and no prospective relief is needed. The formulation of a remedy in malapportionment cases is confided to the court's equitable powers, Reynolds v. Sims, 377 U.S. 533, 585 (1964). In the present case, prospective

relief is not needed because the court has been advised that since the commencement of this action, the California State legislature has adopted a plan for use in the 1984 elections. The particulars of this plan are not now before the court, and the court will not presume that it suffers from any defects. Thus the only relief that the plaintiff could obtain is retrospective relief. Given the enormous dislocation and expense that such a remedy would necessarily entail, for an ephemeral benefit, retrospective relief would constitute an abuse of the court's equitable power. See McMichael v. County of Napa, 709 F.2d 1268, 1273 (9th Cir. 1983) (concurring opinion).[18.08] Since the court is not prepared to grant the plaintiff any relief, it would be a futile act to allow plaintiff leave to amend his complaint.

II

THE RENUMBERING CLAIM

The terms of office for State Senators are staggered. The senatorial term is four years, but every two years half of all senatorial seats are filled by a new election. This procedure can result in voting imbalances when electoral districts are redrawn and renumbered. A voter who was part of an even-numbered district due to vote for a new senator in the next election may be assigned to an odd-numbered district and thus be forced to wait another two years before casting a vote. In the meantime, the voter will be represented by a senator who he or she never elected but who was assigned to the district as a result of the renumbering process. Conversely, a voter who is part of an odd-numbered district not due to vote for two more years may be assigned to an even-numbered

district and thus be enabled to vote two years early. This voter will have sent to the Senate two candidates serving over-lapping, i.e., partially concurring, terms.[18.09]

This phenomenon, known as vote acceleration and vote deferral, is to some extent an inevitable by-product of redistricting. Nevertheless, it seems to be somewhat at odds with the one person-one vote rule derived from the Equal Protection Clause. The plaintiff in the case before the court contends that the Equal Protection Clause obligates the legislature to minimize vote acceleration and vote deferral. He argues that in the instant case, it would have been a simple matter for the legislature to keep such disparities at a minimum, and alleges that the legislature, prompted by partisan considerations, either ignored the disparity or deliberately caused it.

In the 1982 plan, a majority of the voters of districts 6, 12, and 32 had their votes accelerated while a majority of the voters in districts 11, 13, and 37 had their votes deferred. The plaintiff contends that by simply switching the numbers of the two sets of districts, the amount of vote deferral and acceleration could have been reduced significantly.

The Senate counters plaintiff's allegations by arguing that the California Constitution requires that districts be numbered sequentially north to south. This argument has failed to persuade us, however, that sequential renumbering necessarily resulted in the significant acceleration and deferral in the 1982 reapportionment process, or that a sequential numbering system could not have been adopted under which acceleration and deferral would have been substan-

tially less than they seem to have been. There is, therefore, a substantial question whether the reapportionment plan used in the 1982 elections was in all respects consonant with federal equal protection requirements. The court need not answer that question, however, for as noted above the court has determined that it is inappropriate to order equitable relief at this time.

Although plintiff requests the court to order a new election, the court is of the opinion that such a remedy is too drastic considering the present posture of the litigation. Assuming, arguendo,a constitutional violation, any scheme devised by this court to remedy the problem of voting acceleration and deferral would almost immediately be superceded by California's new 1984 apportionment plan. Even if the court were to order a special election, by the time a new

electoral scheme could be designed and ordered, and new elections held, the 1984 elections would be all but underway. The 1984 apportionment plan is not before us and we must presume it to be constitutional. In these circumstances, the ordering of a new election as requested by the plaintiff would not be an appropriate exercise of the court's equitable power. Reynolds v. Sims, supra; Mc Michael v. County of Napa, supra. Cf., Cook v. Board of Education, etc., 424 F. 2d 995, 997 (2d Cir. 1970). The court, therefore, will grant the Senate's motion to dismiss the plaintiff's complaint insofar as it challenges the numbering of the Senatorial districts. In holding that we would not, in any event, grant the relief requested in this case we do not pass upon the question of when, if ever, vote acceleration and deferral can rise to the level of constitutional

infirmity. In addition, we express no opinion as to the appropriate relief in circumstances other than those before us.

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff has moved for a preliminary injunction, asking this court to order (1) the Senators from Senatorial districts 6, 12, and 32 unseated, with special elections to be held in "replacement districts" at a later date; (2) entirely new elections, for both the Senate and the Assembly, as well as Congress, on Tuesday, November 8, 1983. For the reasons as previously discussed and recapitulated briefly below, plaintiff's motion for a preliminary injunction will be denied.

An applicant for a preliminary injunction is entitled to the relief sought if he demonstrates either probable success on the merits of his action plus

irreparable injury in the interim or the existence of serious questions warranting litigation plus a significantly heavier burden of hardships. Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197 (9th Cir. 1980). When the applicant is seeking a mandatory injunction, he must demonstrate a threat of "extreme or very serious damage." Williams v. United States, 704 F.2d 1162 (9th Cir. 1983); Anderson v. United States, 612 F.2d 1112 (9th Cir. 1979).

However threatening the injury which the plaintiff alleges, the "irreducible minimum" is some chance of success on the merits. Benda v. Grand Lodge of the International Association of Machinists, 584 F.2d 308, 315 (9th Cir. 1978); accord, Wilson v. Watt, 703 F.2d 395 (9th Cir. 1983); Sports Form, Inc. v. United Press International, Inc., 686 F.2d 750

(9th Cir. 1982). The court has already determined that the plaintiff has no chance of success on the merits, because even if we were to amend his complaint to allege a cognizable claim, or convince us of the correctness of his vote acceleration and deferral theory, the court would in the exercise of its equitable power deny him the relief he seeks.[18.10] New, state-wide elections would simply be too drastic a remedy for the hypothetical problem which time alone will very shortly resolve.[18.11] Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 738 (1964).

The court is precluded from granting the plaintiff a preliminary injunction on yet other grounds -- plaintiff has completely failed to adduce evidence in support of his claims. Instead, the plaintiff has relied on the allegations in his unverified complaint and the

statements in his memoranda of points and authorities. Plaintiff's bald assertions are inadequate to establish the factual predicates to the issuance of a preliminary injunction. Sampson v. Murray, 415 U.S. 61, 88 (1974). If the plaintiff wished to demonstrate, e.g., that the maximum deviation of the Senatorial districts from the ideal Senatorial districts was greater than 10%, he could do so only by supplying the court with an affidavit executed by a competent affiant. F.R.Civ.P. 43(e); F.R.Evid. 602, 701 and 702. The plaintiff having failed to produce affidavits establishing the facts which might entitle him to a preliminary injunction, this court must, and will, deny the motion.[18.12]

THE ASSEMBLY'S MOTION FOR SUMMARY JUDGMENT

The plaintiff's challenge to the Assembly districts used for both the

primary and general elections seems to be that they, too, failed to conform to the constitutional norm of equal population distribution among districts. See Plaintiff's Second Amended Complaint, pg. 5, line 12 - pg. 6, line 6. The Assembly has moved for summary judgment on the grounds that for such a claim there is only one significant adjudicative fact, i.e., the actual populations of the various districts and the extent to which they vary from each other, that there can no longer be any dispute about that adjudicative fact, and that the Assembly is entitled to judgment as a matter of law. F.R.Civ.P. 56.

Summary judgment is appropriate when there are no material issues of fact in dispute, and when the moving party demonstrates that he is entitled to prevail as a matter of law. Retail Clerks Union Local 468 v. Hub Pharmacy, Inc.,

707 F.2d 1030 (9th Cir. 1983); Fruehauf Corp. v. Royal Exchange Assurance of America, Inc., 704 F.2d 1168 (9th Cir. 1983). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." Securities and Exchange Commission v. Seaboard Corp., 677 F.2d 1301 (9th Cir. 1982).

The court finds, as the Assembly contends, that the sole material issue of fact upon which the resolution of the plaintiff's challenge to the Assembly districts depends is the actual populations of the various districts and the extent to which they vary from each other. Indeed, the court does not understand the plaintiff to suggest the existence of any other material facts. If, therefore, there is no genuine dispute about these data, then there are no

material issues of fact in dispute.

The Assembly has supplied the court with the declaration of James R. Tucker, [18.13] who identifies himself as Chief Legal Counsel to the Assembly Committee on Elections and Reapportionment. [Footnote: The declarations of Mr. Tucker are attached as an exhibit to the declaration of Joseph Remcho, Esq. Mr. Tucker is a competent declarant as to the facts in his declaration, F.R.E. 601 and 703, and the Assembly may prove the facts in Mr. Tucker's declaration by affidavit, F.R.Civ.P. 56(e) and 43(e), or by declaration, 28 U.S.C. §1746. The court can take judicial notice of Mr. Tucker's declartion, F.R.E. 201(b)(2), because Mr. Remcho's declaration adequately establishes the predicates to judicial notice and adequately identifies and authenticates it, F.R.E. 901. Similarly, Mr. Remcho's declaration provides

the basis for admission of a copy of Mr. Tucker's declaration, F.R.E. 1005.] Mr. Tucker's declaration states that the ideal Assembly district was 295,857. It further states that the largest Assembly district had a population of 301,601 or 1.94% greater than the ideal while the smallest Assembly district had a population of 290,005 or 1.98% less than the ideal. The maximum spread between the most populous district and the least populous district was, therefore, 3.92% of the ideal.

The plaintiff vigorously disputes the figures proffered by the Assembly, but not in any legally cognizable way.[18.14] The United States Court of Appeals for the Ninth Circuit has repeatedly held that a party opposing another's motion for summary judgment must counter the moving party's affidavits or declarations with affidavits or declarations

of his own, and failure to do so will result in the granting of the motion. Zoslaw v. MCA Distributing Corp., 693 F. 2d 879 (9th Cir. 1982); Mitchel v. General Electric Co., 689 F.2d 877 (9th Cir. 1982); Estrella v. Brandt, 682 F.2d 814 (9th Cir. 1982); Feldman v. Simkins Industries, Inc., 679 F.2d 1299 (9th Cir. 1982). The plaintiff herein, while questioning the validity of the Assembly's figures in his memorandum in opposition, has not supplied the court with a single declaration from a competent witness that rebuts or qualifies the Assembly's figures.[18.15] Thus, the court must conclude that there are no material issues of fact in dispute.

In discussing the Senate's motion to dismiss, the court referred to those precedents which hold that maximum deviations from the ideal of less than 10% do not violate the Equal Protection

Clause. Brown v. Thomson, 51 U.S.L.W. 4883 (U.S. June 22, 1983); White v. Regester, 412 U.S. 755 (1973); see Connor v. Finch, 431 U.S. 407, 418 (1977). The holdings of those cases apply with equal force to the Assembly's motion for summary judgment and establish that the Assembly is entitled to prevail as a matter of law.

The plaintiff contends that the precedents relied upon by the Assembly cannot be read as sweepingly as the Assembly urges. He points out that each State's plan must be measured in light of the unique circumstances prevailing in that State, and what may be constitutional in one State may not be constitutional in another. Reynolds v. Sims, 377 U.S. 553, 578 (1964). He further relies on the observation of the Court in White v. Weiser, 412 U.S. 783 (1973), that greater mathematical exactitude is

required for congressional apportionment than is required for state legislative apportionment because of the relatively greater number of people per district in the former. Id. at 973. He then asserts that the populations of California's state legislative districts are so large that the rule of "as precise as possible" applicable to Congressional apportionment ought to be the rule in California's state legislative apportionment.[18.16]

While this argument is not without its appeal, it is, in fact, too simplistic to be acceptable. The primary reason that the United States Supreme Court has chosen to tolerate maximum population deviations of less than 10% in state legislative apportionment is the need to accommodate legitimate state concerns, like the state's desire to preserve the integrity of political subdivisions.

Brown v. Thomson,[18.17] supra; Gaffney v. Cummings, 412 U.S. 735 (1973); White v. Regester, supra; Mahan v. Howell, 410 U.S. 315 (1973). The accommodation of such state concerns necessitates political judgments that are best entrusted to the State itself. The need to provide the State with the flexibility to accommodate competing interests is just as compelling in a well-populated state like California as it is in a lightly-populated state like Wyoming. This court, therefore, declines the plaintiff's invitation to distinguish the cases which hold that maximum population deviations of less than 10% do not violate the Equal Protection Clause.[18.18]

The court concludes both that there are no material issues of fact and that the Assembly is entitled to prevail as a matter of law. The court, therefore, grants the Assembly's motion for summary

judgment.

THE CONGRESSIONAL DISTRICTING CLAIMS

Because the court will grant the Senate's motion to dismiss and the Assembly's motion for summary judgment, the only part of the plaintiff's complaint that remains for adjudication is that part challenging the allocation of population among the Congressional districts,[18.19] see Plaintiff's Second Amended Complaint, pg. 3, line 6 - pg. 4, line 6. [Footnote: On some, but not all, of the material recently filed by the plaintiff he has added the California Supreme Court to the caption of the action with the notation "Joined as Defendant, 5-17-82." Presumably, the plaintiff is referring to the document he filed on May 20, 1982, entitled "Service of Process on Supreme Court of California" (document No. 28 in the court's file). It does appear from that

document that the defendant did intend to make the California Supreme Court a party-defendant to this action in some sense; the document bears a passing resemblance to a complaint, though it can hardly be characterized as a short and plain statement of the facts entitling the pleader to relief. The plaintiff was apparently uninterested, however, in compelling the California Supreme Court to answer or otherwise defend; he merely wanted to compel the California Supreme Court to "clarify" its opinion in Assembly v. Deukmejian. The document includes the declaration of an adult not a party to the action who avers that she deposited a copy of the "complaint" in the mail, properly addressed and with first-class postage fully pre-paid, and personally delivered a copy of the "complaint" to the Los Angeles offices of the California Supreme Court. F.R.Civ.P.

4(d)(6); Cal. CCP.§§416.50 and 415.20(a). The problems presented by this course of conduct on the part of the plaintiff are legion. Thoroughly dispositive, however, is the failure of the plaintiff to comply with Federal Rules of Civil Procedure 15 and 21. The plaintiff filed his first amended complaint on March 11, 1982. Thereafter the plaintiff could not unilaterally amend or supplement his complaint, as he apparently attempted to do. F.R.Civ.P. 15. Rule 21 of the Federal Rules of Civil Procedure similarly makes leave of the court a prerequisite to the addition of other parties to the action.

> Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and such terms as are just.

The plaintiff did not obtain leave of court to make the California Supreme Court a party. The California Supreme Court is not, therefore, a party to this

action at all.] For reasons which must be obvious to the parties, the court harbors serious reservations about the adequacy of the complaint. Although a court may act on its own initiative in dismissing a complaint which does not state a claim upon which relief can be granted, the court must provide the plaintiff with notice and an opportunity to address the matter. Wong v. Bell, 642 F.2d 359 (9th Cir. 1981). The court has previously determined that defendant Eu is the proper party to represent the interests of the Congressional delegation.

The court will, therefore, order the plaintiff and defendant Eu to brief the sufficiency of the plaintiff's complaint insofar as it challenges the constitutionality of the Congressional districts. The Senate and the Assembly, defendant-intervenors, are therefore

invited to submit such briefs as either think may assist the court in its deliberations, such briefs to be submitted simultaneously with that submitted by defendant Eu. No brief submitted by any party shall exceed twenty-five typewritten, double-spaced pages. Thereafter, the matter will be deemed submitted without oral argument upon receipt, by the court, of the last brief. Morrow v. Topping, 437 F.2d 1155 (9th Cir. 1971). In this regard, the parties, and each of them, may submit written briefs as to the sufficiency of plaintiff's complaint in regard to the constitutionality of the Congressional districts as per the following briefing schedule:

(1) Defendant's moving papers due not later than April 23, 1984;

(2) Plaintiff's response due not later than May 14, 1984;

(3) Defendant's reply, if any, due

not later than May 28, 1984. [Footnote: On December 6, 1983, the plaintiff filed a motion for declaratory judgment (by which the court understands the plaintiff to mean summary judgment) on the constitutionality of the districts used in California's 1982 congressional and state legislative elections; the plaintiff has moved the court for a declaration that all such elections are a nullity and an order that special elections be held on June 5, 1984. Additionally, the plaintiff has moved for summary judgment on the constitutionality of the districts created by the 1983 redistricting plan, an injunction prohibiting the use of such districts in the 1984 elections, and a Court-ordered redistricting. This order obviously moots the plaintiff's motions with respect to the State Senate and Assembly districts. The court herein grants the Senate's motion to dismiss

the plaintiff's action with prejudice and grants the Assembly's motion for summary judgment, finding that the districts used for the Assembly elections were, in fact, constitutional.[18.20] For that reason, the court declines to take cognizance of the plaintiff's motions insofar as they address the districts used in the 1982 Senate and Assembly elections. The court likewise declines to take cognizance of the plaintiff's motions that seek an adjudication of the districts created by the 1983 redistricting plan. The plaintiff's complaint does not raise any issue, factual or legal, regarding the 1983 redistricting plans.[18.21] Absent considerations not applicable here, see F.R.Civ.P. 15(b) and 16, the complaint defines the issues raised by the litigation. The plaintiff is free, of course, to move for leave of court to file a

supplemental complaint, F.R.Civ.P. 15(d), But he has not done so. The plaintiff is not free to seek an adjudication of disputes not fairly presented by the complaint. This leaves the plaintiff's motion for summary judgment on the constitutionality of the 1982 congressional districts.[18.22] This motion may be brought by the plaintiff, and it will be scheduled for briefing in accordance with the schedule already established in this order. The plaintiff may file such additional material as he concludes is appropriate in light of this order (e.g., affidavits or declarations by competent witnesses establishing the truth of the plaintiff's factual assertions) on or before April 23, 1984; the defendant may file whatever opposition she deems appropriate on or before May 14, 1984; and the plaintiff may file a reply to the defendant's opposition on or before May

28, 1984[18.23]. The court will determine at the conclusion of the briefing whether oral argument is likely to assist the court in adjudicating the issues presented by the motion and issue an order accordingly.]

IT IS SO ORDERED.

/s/ Anthony M. Kennedy, Judge
United States Court of Appeals

/s/ Lawrence K. Karlton, Chief Judge
United States Court of Appeals

/s/ Raul A. Ramirez, Judge
United States Court of Appeals

Dated: March 27, 1984.

Plaintiff's Contextual Footnotes:

18.01 Plaintiff notes the jurisdictional significance of the Court's decision to hold no hearing on Plaintiff's Assembly claim at 17 Record 104-105:

"The Assembly aspects of Plaintiff's motion for a preliminary injunction is the only Assembly remedy on which the District Court has ever ruled. The order of March 27 (at 12 Record 255) denies any Assembly relief on the ground that the motion is 'obviously moot.'

"The Assembly has tried to use this denial as a basis for Supreme Court jurisdiction under 28 U.S.C. § 1253, but the ground cited by the District Court will not support direct appeal under MTM v. Baxley (1975) 420 U.S. 799. Even if the repeal of 28 U.S.C. § 2281 should be deemed to remove the need for judicial narrowing of the direct appeal provisions of 28 U.S.C. § 1253 and denial of injunctive relief by a three-judge court on any ground should therefore be deemed acceptable under § 1253, the District Court's denial of injunctive relief re. the contested Assembly districts cannot justify a direct appeal. This is so because the scope of § 1253 is limited to motions for injunctive relief decided by three-judge courts after notice and hearing. Not only was there no hearing on Plaintiff's Assembly-related injunctive porposal, the three-judge panel has never allowed oral argument before ruling on any Assembly-related aspect of the case.

"In spite of the hearing requirement of 28 U.S.C. § 2284, the order of March 27 never mentions why the Court feels it would not be aided by oral argument in evaluating the Assembly's summary judgment motion (the granting of which precluded Plaintiff from submitting any revised proposal for Assembly-related injunctive relief). The order simply says, 'The Court concludes both that there are no material issues of fact and that the Assembly is entitled to prevail as a matter of law. The Court, therefore, grants the Assembly's motion for summary judgment." (12 Record 250.)"

18.02 Plaintiff quotes verbatim the Senate's proffered dismissal grounds at 17 Record 98-101 and comments at 17 Record 102-103:

"In trying to treat its own dismissal for failure to state a claim as a granting of the Senate's motion which invoked the same rule on different grounds the Court abandons without discussion its July 1982 affirmation of well-established procedure which keeps the question of the granting or denial of injunctive relief entirely separate from the question of the dismissal of the complaint.

"A denial of a motion for injunctive relief cannot properly be converted into a dismissal of a complaint as the Court does here, because of the possibility that there are other remedies which the court has not yet considered which

are of more limited scope and therefore less objectionable on equitable grounds. In a redistricting case there is always the possibility that special elections may be required if an incumbent dies or resigns, and it is no more disruptive to hold a special election in a properly apportioned district than in a malapportioned one. Moreover, even if there were no feasible alternative remedies that should be brought to the court's attention, a denial of injunctive relief on equitable grounds is never a bar to a Plaintiff's then seeking declaratory relief.

"The language of the order does not discuss the underlying issue at all, but simply states,

> 'Because the Court is persuaded that the Plaintiff has failed to state a cause of action upon which relief can be granted, the Court will dismiss Plaintiff's claims which address the senatorial districts. F.R.Civ.P. 12(b)(6). The Court intimates no view on the merits of the Senate's remaining grounds for its motion.' (12 Record 236.)

"In short, it is obvious from the language used in the order of July 1, 1982 noting that equitable considerations are not a basis for a motion to dismiss for failure to state a claim that the Court has completely reversed itself on this question in the order of March 27, 1984. Since the Senate did not include the ground rejected by the order of July 1, 1982 in its January

7, 1983 dismissal motion, it is simply not true that the order of March 27 supported one of the Senate's grounds for dismissal. In fact the order of March 27 ignores these grounds altogether and grants its own motion sua sponte."

18.03 Plaintiff argues in support of reconsideration at 12 Record 325-326:

"In its search for a rationale for refusing to consider the partisan gerrymandering aspect of this case this court has repeatedly contradicted itself.

"After Plaintiff had protested that Judge Karlton had interpreted the Equal Protection Clause as if it did not apply to Republicans the full panel responded in its order of April 19, 1983:

> 'There is certainly something to be said for the notion that the Equal Protection Clause protects member of minority political groups from intentional discrimination in the reapportionment process.' 8 Record 121.

But the panel also noted, 'There is not, however, any fundamental right to proportional representation based on political affiliation.' 8 Record 123. In the supplemental briefing requested by the order of April 19 Plaintiff noted (at 8 Record 255-257) the difference between disproportionate political representation and systematic dilution of Republican voter power, the latter being the basis of his partisan gerrymandering claims (5 Record 274-275 and

287-296).

"The order of March 27, 1984 [at 12 Record 238] returns to Judge Karlton's position that Republicans do not enjoy the protection of the Fourteenth Amendment:

> '[T]he plaintiff's allegation that the apportionment plan discriminates against Republicans avails him nothing. There is no authority for the proposition that a reapportionment plan that discriminates on the basis of political party offends the Equal Protection Clause.'

"In refusing to recognize as unconstitutional systematic population disparities which discriminate against a political party the order of March 27 also contradicts the position taken by the panel on this point when it affirmed Judge Karlton's order of July 1, 1982 on April 19, 1983. In his order of July 1 Judge Karlton notes:

> 'I do not mean to suggest that the alleged distortion of election districts to serve political ends is irrelevant to the question of whether deviations from absolute population equality are justifiable under the standards set out in Wesberry v. Sanders, 376 U.S. 1 (1964) and Mahan v. Howell, 410 U.S. 315 (1973).' 4 Record 49.

The fact that the panel has now abandoned this position does not affect the validity of the proposition that population disparities that are not unacceptable per se

may be unconstitutional if used as a device for political favoritism. See Roman v. Sincock (1964) 377 U. S. 695, 710."

18.04 Plaintiff argues in support of reconsideration at 12 Record 237: "The Supreme Court has indeed recognized that racial or ethnic minority groups may be 'subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process' San Antonio School District v. Rodriguez (1973) 411 U. S. 1, 28. But the fact that political groups do not enjoy this extraordinary protection does not place members of these groups outside the scope of the Fourteenth Amendment, which states, '. . . nor shall any state . . . deny to ANY person within its jurisdiction the equal protection of the laws.' Emphasis added."

18.05 Plaintiff argues in support of reconsideration at 12 Record 322-324:

"The order rejects [at 12 Record 240] Plaintiff's contention that Connor v. Finch (1977) 431 U. S. 407 mandates stricter population equality standards for a plan adopted by the California Supreme Court than for a plan enacted into law by a state legislature, and (at 16) the order cites Connor v. Finch at 418 in support of the contention that the redistricting plans adopted

by the California Supreme Court for the 1982 senate and assembly elections do not violate the Equal Protection Clause so long as the maximum population deviations in these plans are less than 10%. However, Connor v. Finch at 418 refers to '"under-10%" deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionment.' Emphasis added.

"The order [at 12 Record 240] also rejects the applicability of Chapman v. Meier (1975) 420 U.S. 1, where the Court ruled: 'We hold today that unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature . . . must ordinarily achieve the goal of population equality with little more than a de minimis variation.' Id. at 26-27. The order (at 7) rejects this standard on the ground that:

> 'The relationship of a federal district court to a state is quite different from the relationship of the state's highest court to the state. The court assumes that the state's highest court is far better equipped to identify and implement competing state interests than is the federal district court; thus the rule that court-ordered apportionment plans are subject to severe constraints has no application to apportionment plans adopted by the state's highest court.'

"A state supreme Court undoubt-

edly has broader latitude in defining state policy than a federal court, but this does not vest the state court with the power to 'reconcile conflicting considerations in the people's name,' which is the rationale for allowing minor population disparities in legislatively enacted apportionment plans. See Reynolds v. Sims (1964) 377 U.S. 533, 586. Chapman v. Meier placed no limitation on a state court's authority to define state policy which may provide a basis for greater than de minimis population disparities, while a federal court may be restricted to invocation of policies already defined by state government; however, Chapman does require that whatever court devises a state legislative plan articulate an appropriate rationale for any unnecessary population disparities among districts:

> 'Where important and significant state considerations rationally mandate departure from these standards it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted.' Id. at 26.

Not only did the California Supreme Court not articulate any considerations which mandated departure from the Chapman standards for court-ordered plans, the California court itself invoked these standards to justify the adoption of its state legislative redistricting plans, noting that 'the high court has

held that a court-ordered plan, such as that which established California's old districts, must be held to higher standards than a state legislature's plan. (Chapman v. Meier (1975) 420 U.S. 1, 26.)' Assembly v. Deukmejian (1982) 30 Cal.3d 638, 667. In such circumstances it is illogical and unreasonable for this panel to refuse to allow a challenge to these same districts on the basis that they do not in fact comply with the Chapman standards.

"Moreover, even if the Chapman standards were not applicable, California's own population-equality standards for court-ordered plans are only slightly less strict and would invalidate the contested state legislative districts even if population disparities are as small as the proponents of these districts have claimed. See Legislature v. Reinecke IV (1973) 10 Cal.3d 396.

"The United States Supreme Court has found it necessary to admonish the Ninth Circuit that it must adjudicate potentially dispositive state law claims under pendent jurisdiciton, and this panel simply must heed this admonition. See Schmidt v. Oakland Unified School District (1982) 73 L.Ed.2d 245."

18.06 Plaintiff argues in support of reconsideration at 13 Record 160-162:

"It is not necessary to oppose the proposition that as a matter of federal law a state supreme court may adopt a state legislative

apportionment plan with population disparities as large as those which would be allowable if the plan were adopted by some other agency of state government to justify a stricter population equality standard for the court-ordered state legislative plans mandated by Assembly v. Deukmejian. In Assembly v. Deukmejian at 30 Cal.3d 678 the California Supreme Court notes that under our state constitution reapportionment is 'an area of public policy reserved for the people and their elective representatives.' At 30 Cal.3d 667 the California High Court based its adoption of the contested Assembly districts on the federal requirements set forth in Chapman v. Meier (1975) 420 U.S. 1, 26. Since the California Supreme Court explicitly disavowed any power to establish state reapportionment policy and based its selection of the contested redistricting plans on the Chapman requirement that court-ordered state legislative plans must have only de minimis population disparities, Plaintiff should be allowed an opportunity for sufficient discovery to determine whether the contested Assembly districts actually satisfy the Chapman guidelines.

"It should also be noted that when the California Supreme Court adopted the population equality standards of Legislature v. Reinecke IV (1973) 10 Cal.3d 396 it did so by applying federal caselaw to California circumstances. See 10 Record 272. When a state supreme court adopts a reapportionment plan

as provided by Maryland Committee v. Tawes (1964) 377 U.S. 656, 674, 'The same federal constitutional standards are applicable whether the matter is litigated in a federal or a state court'; so a federal court evaluating the validity of that plan as provided by Scott v. Germano (1965) 381 U.S. 407, 409 should not excuse the proponents of the adopted plan from proving the statistical claims made for the plan in the state proceedings which led to its adoption. This court would not be reviewing any interpretation of California law in evaluating compliance of the contested Assembly districts with federal requirements. To the extent that state law was a factor in Assembly v. Deukmejian it only served to tighten the population equality requirements set forth in the Reinecke cases. See 30 Cal. 3d at 672-673."

18.07 Plaintiff argues in support of reconsideration at 12 Record 364-369:

"If amendment were allowed Plaintiff would base his attack on geographic inequality of representation in the 1982 and 1984 senate districts on the following legal and factual premises:

1) The prima facie threshold which determines the burden of proof regarding whether population disparities constitute invidious discrimination has been defined in terms of average deviation: 'The total variation between two districts was 9.9%, but the average deviation of all House

districts from the ideal was 1.82%.' White v. Regester (1973) 412 U.S. 755, 764 and absolute size of population disparities, not just maximum percentage variation:

> 'The District Court thought the state plan involved unacceptably large variations between districts, although in the House, with districts of about 20,000 people, the average variation involved only 399 people, and the largest variations only 1,573 people.' Gaffney v. Cummings (1973) 412 U.S. 735, 750.

2) The unique circumstances of a state carry important weight in the determination of the acceptability of population disparities, above and beyond general statistical guidelines.

> 'Our affirmance of the decision below is not meant to indicate approval of the District Court's attempt to state in mathematical language the constitutionally permissible bounds of discretion in deviating from apportionment according to population. In our view the problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause.' Roman v. Sincock

(1964) 377 U.S. 695, 710.

> 'What is constitutionally permissible in one state may be unsatisfactory in another, depending on the particular circumstances of the case. . . . In any event, the fact that a 10% or 15% variation from the norm is approved in one state has little bearing on the validity of a similar variation in another state.' Swann v. Adams (1967) 385 U.S. 440, 445.

3) In applying White v. Regester, supra and Gaffney v. Cummings, supra to the circumstances of California, the court in Legislature v. Reinecke IV (1974) 10 Cal.3d 396, 402 adopted a population standard for state legislative districts allowing only a 1% deviation from the norm with a 2% maximum in unusual circumstances. In Assembly v. Deukmejian (1982) 30 Cal.3d 638, 667 the court notes that population equality standards have been tightened since Reinecke IV. No state or federal court applying federal standards to California has suggested that looser standards for population equality than those adopted in Reincke IV are acceptable. The burden of proving otherwise cannot be met by pointing to the fact that greater population disparities, as measured by the most favorable of the three statistical guidelines, were allowed in Texas and

Connecticut, as defendants have tried to do.

"The order of March 27, 1984 (at 17) notes:

> 'The primary reason that the United States Supreme Court has chosen to tolerate maximum population deviations of less than 10% in state legislative apportionment is the need to accommodate legitimate state concerns, like the state's desire to preserve the integrity of political subdivisions.'

However, this factor has been tied directly to the populations of districts; in Abate v. Mundt (1971) 403 U.S. 182, 185 the U. S. Supreme Court notes that since 'legislative districts may have a much smaller population . . . slightly greater percentage deviations may be tolerable' without violating equal protection requirements. Moreover, Plaintiff has thoroughly demonstrated that the contested districts grossly violate the geographic integrity of political subdivisions. See 1 Record 112-115, 135-163, 2 Recrod 70-71, 175-177, 266-268, 3 Record 64-67, 4 Record 11-13, 8 Record 529-537, 10 Record 272-291, 351-355 and 11 Record 415-424.

"The order of March 27, 1984 (at 17) then cites Brown v. Thomson, supra and continues:

> 'The accommodation of such state concerns necessitates political judgments that are best entrusted to the state

> itself. The need to provide the state with the flexibility to accommodate competing interests is just as compelling in a well-populated state like California as it is in a lightly-populated state like Wyoming. This court, therefore, declines the plaintiff's invitation to distinguish the cases which hold that maximum deviations of less than 10% do not violate the Equal Protection Clause.'

The Wyoming situation involved a plan duly enacted by a state legislature which uniformly adhered to county boundaries and which even plaintiffs did not challenge except with respect to a single district. Allowing one sparsely populated county to elect its own representative increased the average population of the remaining districts by less than 100 people, an impact on the voting power of the rest of the state which was found to be de minimis and hence constitutional. In California an unelected court by a bare majority (which consisted of the incumbent governor's former chief of staff, one of her former law professors appointed at her behest, a temporary appointee chosen by her and a new justice appointed by the same governor, sitting on his first major case) ordered into effect redistricting plans without adjudicating challenges to their constitutionality and

in spite of their being blocked by valid referendum petitions (and resoundingly rejected by the electorate before the general election). The only uniformly applied policy manifest by the California redistricting plans is one of invidious discrimination against candidates of the party out of power. Population disparities in the newly enacted senate districts, together with the double representation of two districts and the total disenfranchisement of two others, emasculated the goal of equality of representation to the point where a smaller minority of California's population could control the Senate (less than 45% versus 46.4%) than if the districts based on the 1970 census had been left in place.

4) Even minor population disparities below the prima facie threshold as it may be defined in a specific state must not be used as a discriminatory device.

> '[T]he proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.' Roman v. Sincock

(1964) 377 U.S. 695, 710.

5) If the Senate continues to stonewall Plaintiff's requests for district populations and information on divided census tracts which are necessary to derive the best evidence he will rely on affidavits submitted by Republican reapportionment analysts in Assembly v. Deukmejian which document population disparities in the 1982 districts twice as large as those alleged in Plaintiff's complaint and on the figures from the Rose Institute noted at 8 Record 523, which show a population disparity between the largest and smallest 1984 senate districts of 38,781."

19.08 Plaintiff argues in support of reconsideration:

"At every opportunity from the outset of this litigation Plaintiff has urged the court to decide the case promptly.

"Plaintiff vehemently protested the decision of Judge Karlton at the May 3, 1982 status conference to postpone action until after the June Primary Election in order to allow the Assembly time to prepare a dismissal motion even though the Assembly had declined Plaintiff's urging two months earlier that it intervene then. The Assembly had secured Plaintiff's April 27, 1982 stipulation to its intervention (2 Record 353-354) with an oral promise that this would not delay proceedings, and Plaintiff called this agreement to Judge Karlton's attention at the

May 3, 1982 conference; nevertheless, Judge Karlton set a hearing date which accommodated the Assembly's desire that the hearing be held on a Friday at least a month later.

"In his order following the status conference Judge Karlton noted: 'It now appears that the plaintiff may still obtain a legally efficacious remedy should he prevail on the merits of this action after this court disposes of the motions brought on pursuant to this order.' See 11 Record 18-21. But after a long series of equally unjustified delays in adjudication the Court refused to rule on the constitutionality of the contested districts at its October 27, 1982 hearing. The Court held a hearing on February 16, 1983 but delayed ruling on the merits of Plaintiff's claims until March 27, 1984; then the Court's order proclaimed (at 8),

> '[T]he only relief that the Plaintiff could obtain is retrospective relief. Given the enormous dislocation and expense that such a remedy would necessarily entail, for an ephemeral benefit, retrospective relief would constitute an abuse of the Court's equitable power. See McMichael v. County of Napa, 709 F.2d 1268, 1273 (9th Cir. 1983) (concurring opinion). Since the Court is not prepared to grant the Plaintiff any relief, it would be a futile act to allow Plaintiff leave to amend

his complaint.'" (12 Record 370-371.)

"Judge Kennedy's [supporting] McMichael citation, Kramer v. Union Free School District No. 15, 395 U. S. 621 (1969), contradicts the panel's application of McMichael (at 10-11 of the March 27, 1984 order):

'Although Plaintiff requests the Court to order a new election, the Court is of the opinion that such a remedy is too drastic considering the present posture of the litigation. Assuming, arguendo, a constitutional violation, any scheme devised by this court to remedy the problem of voting acceleration and deferral would almost immediately [actually by the time the 1985 legislative session starts in some instances, and not until 1987 in others] be superceded by California's new 1984 apportionment plan. Even if the Court were to order a special election, by the time a new electoral scheme could be designed and ordered, [only three replacement districts would actually be needed] and new elections held the 1984 elections would be all but underway. The 1984 apportionment plan is not before us and we must presume it to be constitutional. In these circumstances, the ordering of a new election as requested by the Plaintiff would not be an appropriate exercise of the Court's equitable powers.'

"However, the Kramer opinion notes:

> 'The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.' 395 U.S. at 628.

Anyone with even a nodding acquaintance with redistricting realizes that legislators design their own districts not to reflect the public will, but to maximize their own chances for re-election. Any presumption that the contested senate districts reflect the public will is utterly refuted by the resounding rejection of Proposition 11 by the electorate in June 1982. When the Senate adopted essentially unchanged districts for use in the 1984 elections it was so certain of the public reaction that it illegally adopted an urgency clause to bar another referendum challenge." (12 Record 370-377.)

18.09 Plaintiff responds to this misrepresentation at 17 Record 86-87:

"However, the order of March 27, 1984 seriously misrepresents Plaintiff's senate district renum-

bering claim in characterizing the issue as a matter of transferring some voters between odd- and even-numbered districts. In fact this claim protests that giving a formerly even-numbered (gubernatorial-year) district an odd number disenfranchises it when no election is held to replace the incumbent whose term expires. Its even number is given to a whole district of voters who because they lived in an odd-numbered district elected a senator in 1984. Thus they may elect a second senator two years later and thereby be doubly represented. This misnumbering was done to three pairs of senate districts, and the doubly represented districts were on average 8% more Democratic in registration than the Republican-leaning districts which lost representation in the State Senate for two years. These prematurely elected senators then provided extra votes that were needed to enact new redistricting legislation to ensure Democratic control of the State Senate for the balance of the decade.

"The order of March 27 describes Plaintiff's renumbering claim thus:

> 'A voter who was part of an even-numbered district due to vote for a new senator in the next election may be assigned to an odd-numbered district and thus be forced to wait another two years before casting a vote. In the meantime, the voter will be represented by a senator who he or she

never elected but who was assigned to the district as a result of the renumbering process." (12 Record 242.) Emphasis added.

There was one instance of an incumbent of a disenfranchised district moving into a new district which included a small fraction of his former territory, but with regard to the other two pairs of contested districts the Court's description is completely false."

18.10 Plaintiff notes (at 16 Record 47) how the Court has changed its position yet allows no opportunity for Plaintiff to defend his claim in light of the Court's new interpretation of the Rules:

"The order of March 27 notes [at 12 Record 236]:

'Because the Court is persuaded that Plaintiff has failed to state a cause of action upon which relief can be granted, the Court will dismiss Plaintiff's claims which address the Senatorial districts. F.R.Civ.P. 12(b)(6). The Court intimates no view on the merits of the Senate's remaining grounds for its motion.'

"Prior to March 27, 1984 the position of the Court on the relationship between Rule 12(b)(6) and equitable considerations was that noted in the order of July 1, 1982 [at 4 Record 54]:

'[E]quitable considerations, however, will be entertained

if and when the Court considers what remedies, if any, may be afforded to the Plaintiff. These considerations do not bear on the question of whether the Plaintiff has properly invoked the jruisdiction of this court, or whether he has stated a claim upon which relief can be granted.' Emphasis added."

18.11 Plaintiff notes (at 17 Record 97) the Court's prior stalling tactics which caused injunctive relief from senate district misnumbering to become "too drastic" to be granted by the Court:

"This denial of injunctive relief dur to the time factor came more than two years after Plaintiff presented these claims, the Court having refused to rule on May 4, 1982 (Item #4), August 31, 1982 (Item #7), October 19, 1982 (Item #8), November 1, 1982 (Item #10), December 17, 1982 (Item #15), April 19, 1983 (Item #16), and February 6, 1984 (Item #17).

"The Court delayed ruling for a year after the February 1983 hearing because the issues required 'most careful and thorough consideration by the Court' (order of April 19, 1983 at 8 Record 118). But the order of March 27, 1984 refuses to provide even declaratory relief by ruling on the constitutionality of the numbering of the contested senate districts.

'In holding that we would not, in any event, grant the relief requested in this case

we do not pass upon the question of when, if ever, vote acceleration and deferral can rise to the level of constitutional infirmity. In addition, we express no opinion as to the appropriate relief in circumstances other than those before us.' (8 Record 244.)"

18.12 Plaintiff reviews the circumstances of the case relating to this assertion at 12 Record 360-363:

"Plaintiff's factual basis for seeking injunctive relief was set forth in detail in Plaintiff's inclusive brief filed on March 11, 1982. Most of Plaintiff's factual statements are simply compilations of U.S. Census figures and do not require verification by affidavit unless the opposition alleges that the various totals provided by Plaintiff do not accurately reflect published census data. The evidentiary status of the U.S. Census in apportionment cases hardly need be established by an expert witness. In Chavis v. Whitcomb (1969) 307 F. Supp. 1362, 1366 the opinion simply notes: 'In establishing district lines for the metropolitan areas of the state, the Court has taken judicial notice of the 1960 census statistics as to the location of the non-white population.'

"Without citing a single redistricting case where affidavits have been used in lieu of census data, the Senate observes, '[I]t must be noted that plaintiff has provided no evidence, by way of

declaration or affidavit, tending to demonstrate a cognizable claim or the likelihood of irreparable injury.' (7 Record 219.) To this Plaintiff responded in his rebuttal:

> 'Plaintiff has provided detailed documentation of the factual basis for every one of his claims. If the accuracy of any of the empirical facts on which Plaintiff relies is questioned Plaintiff will provide additional documentation upon request.' (7 Record 458.)

"At the February 16, 1983 hearing counsel for the Senate argued orally that Plaintiff's claims should be dismissed for lack of supporting affidavits. The Court then asked counsel whether he was disputing the accuracy of Plaintiff's factual premises. When counsel conceded that he was not, this seemed to end the matter.

"On April 19, 1983 the Court called for additional briefing on Plaintiff's proposed injunction. In its brief the Senate again decries the absence of affidavits supporting Plaintiff's claim, alleging that 'Plaintiff has presented not even a single shred of evidence tending to support his claim of population inequality among districts.' But the Senate does not challenge the accuracy of any of the factual statements made by Plaintiff. See 8 Record 137.

"In his response to the Senate Plaintiff pointed out that the Senate had provided absolutely no population data itself and had

refused Plaintiff's requests for materials under the control of the Senate which were essential to Plaintiff's analysis of population disparities in the contested senate districts. See 8 Record 189-194. The legal implications of preventing a plaintiff from preparing necessary affidavits by refusal to provide raw data available only from a defendant are discussed above in connection with the Assembly's summary judgment motion, where a factual dispute actually exists.

"At the February 16, 1983 hearing the Court certainly seemed to take the position that affidavits were not needed to support undisputed facts. It is indefensible for the Court to reverse such a self-evident position in order to rule:

> 'Under ordinary circumstances this court would give the plaintiff leave to amend his complaint to allege sufficient disparity between the actual and the ideal to state a claim for relief. In this case, however, the court is satisfied that amendment would constitute an idle act. For that reason, leave to amend will be denied, and the plaintiff's complaint, insofar as it addresses the apportionment of the senatorial seats, will be dismissed with prejudice.'

Order of March 27, 1984 at 7. Whatever this court's view may be regarding the underlying constitutional issues, there is simply no basis for dismissal without leave

to amend when a plaintiff has been precluded from properly developing his case by a defendant's refusal to provide essential information."

18.13 Plaintiff criticizes the "Evidentiary Inadequacy of Assembly's Population Claims" at 12 Record 335-344:

"The Assembly has suggested that if Plaintiff wishes to challenge the validity of the alleged district populations it has presented in an affidavit by Mr. James Tucker, Chief Counsel to the Assembly Committee on Elections and Reapportionment, he must reconstruct the entire assembly plan from raw census data and the legal descriptions of the districts. This would be an extremely time-consuming process under the best of circumstances, since the contested assembly districts are so convoluted and involve so many split census tracts and block groups that it cost the Assembly several hundred thousand dollars to have them constructed in the first place; but because there are several hundred discrepancies (8 Record 49-82) between the descriptions of the districts in the enacting legislation and those actually used to conduct the 1982 elections the task is impossible.

"Mr. Tucker's affidavit only establishes what Mr. Tucker thinks the assembly district populations are. At 8 Record 166 Plaintiff notes:

> 'Plaintiff does not doubt that the Assembly's computers do in fact compute the population figures attested to in

> Exhibit A by James Tucker; but unless the Assembly is willing to provide a printout showing how it arrives at the populations it uses for split census tracts it is impossible to evaluate the accuracy of the Assembly's data base.'

Plaintiff's position is supported by Proof of Facts 2nd Volume 16, "Computer Evidence" § 13 at 297:

> [Supporting quotation.]

"By refusing to supply the best evidence of its population claims, verifiable census data, the Assembly fails to meet ordinary evidentiary standards, much less those required for summary judgment. Since Plaintiff requested supporting census data the adverse inference rule is applicable.

> 'The rule is stated in the article on Evidence, 31 C.J.S. § 156, p. 851, as follows:
>
> > "An unfavorable inference may result from the unexplained failure of a party to produce documentary or other real evidence."'
>
> Evis Manufacturing Company v. F.T.C. (1961) 287 F.2d 831, 847.

> 'It is a familiar rule of evidence that a party having control of information bearing upon a disputed issue may be given the burden of bringing it forward and suffering an adverse inference from failure to do so. See McCormick, Evidence § 337 at 878 (2nd ed.

1972).' Alabama Power Company v. Federal Power Commission (1974) 511 F.2d 383, 391, n. 14.

"The Court of Appeals in Allstate Finance Corporation v. Zimmerman (1964) 330 F.2d 740, 744 discusses how the adverse inference rule shifts the burden of proof.

[Supporting quotations.]

"Since the nearly universal practice in reapportionment cases is to document district populations with census data, as the proponents of the A.B. 301 congressional districts sought to do in Assembly v. Deukmejian supra, P.R. Mallory & Co. v. N.L.R.B. (1968) 400 F.2d 956, 959 precludes the Assembly's attempt to prove district populations with affidavits.

'In Neiderhoefer v. Automobile Ins. Co. of Hartford, Conn., 7 Cir., 182 F.2d 269, 271, we pointed out that failure to produce evidence, which under the circumstances would be expected, gives rise to a presumption against the party failing to produce it.'

"Hoffman v. Commissioner of Internal Revenue (1962) 298 F.2d 784, 788 provides another example of the unacceptability of secondary evidence derived from documents under the exclusive control of a litigant.

[Supporting quotation.]

This same concept is squarely affirmed in I.N.A. Aviation Corp. v. United States (1979) 468 F.Supp. 695, 700.

'An inference that relevant

> evidence would be unfavorable is also justifiable where it is within the control of a party in whose interest it would naturally be to produce it and he fails to do so, without satisfactory explanation, and instead produces weaker evidence or no evidence. Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310, 315 (8th Cir. 1946).'

In Keen the opinion notes:

> 'The agreement between them was the best if not the only available evidence conclusively establishing the relationship between them. This evidence was not produced. "Where relevant evidence is within the control of the party to whose interest it would naturally be to produce it and he fails so to do, without satisfactory explanation, and produces no evidence or weaker evidence, an inference is justifiable that it would be unfavorable to him." Goldie v. Cox, 8 Cir., 130 F.2d 695, 719; Donnelly et al. v. Dubinsky et al., 8 Cir., 154 F.2d 38.' 157 F.2d at 315.

And Goldie v. Cox involves a situation similar to the Assembly's withholding of population data.

[Supporting quotation.]

"The Assembly's excuse for not supplying the requested population data, that as-yet-unexplained compulsory disclosure procedures are necessary to secure this information, is squarely rejected in

International Union (U.A.W.) v. N.L.R.B. (1972) 459 F. 2d 1329.

> 'Before proceeding with a discussion of how the adverse inference rule applies to the facts of this case, we should note a few more of its general characteristics particularly relevant here. First, it is important to realize that the applicability of the rule in no way depends on the existence of a subpoena compelling production of the evidence in question. The theory behind the rule is that, all other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case. If evidence within the party's control would in fact strengthen his case, he can be expected to introduce it even if it is not subpoenaed. Conversely, if such evidence is not introduced, it may be inferred that the evidence is unfavorable to the party suppressing it.' Emphasis added. Id. at 1338.

International Union v. N.L.R.B. also notes:

> 'The adverse inference rule allows a tribunal to attach weight to a party's intransigence without resorting to the awkward enforcing process. . . . Rather the tribunal simply utilizes the commonsense inference that if the evidence would do the suppressing party any good, he would readily

produce it. [Footnote deleted.]

'Finally, it should be noted that, contrary to the Board's assertions in its brief, the adverse inference rule has nothing whatever to do with the separate rules requiring, under some circumstances, the production of best evidence. The best evidence requirement is an exclusionary rule which suppresses weak evidence in situations where nonproduction of best evidence is unexplained. In contrast, the adverse inference rule excludes no evidence. Moreover, again unlike the best evidence rule, the adverse inference rule need not be triggered by an attempt to introduce weak evidence. Instead, the rule allows a party to introduce any evidence for what it is worth, but always subject to the independent inference that nonproduction of putatively strong evidence indicates that this evidence would be harmful to the suppressing party.' Id. at 1339.

Thus the Tucker declaration should have been entirely excluded under the best-evidence rule."

18.14 Plaintiff discusses (at 17 Record 110-111) the actual documentation before the Court on this issue:

"In Plaintiff's motion for reconsideration (at 13 Record 148-149) he points out that he had in fact supplied the necessary affidavit

(from the Assembly Republicans' chief reapportionment consultant):

> 'The Assembly has never directly challenged the validity of Dr. T. Anthony Quinn's figures for the A.B. 300 assembly districts which are found in Exhibit C-2 of Plaintiff's original complaint. . . .
>
> 'The maximum population disparity of 18.92% noted by Dr. Quinn is unaffected by the officially approved corrections to A.B. 300, since this disparity is between 10 AD and 70 AD, and neither of these districts is changed by the corrections.
>
> 'Plaintiff has also computed the maximum disparity without considering 70 AD, since the legislative intent regarding this district is impossible to determine from the text of A.B. 300. After correcting typographical errors in A.B. 300 where legislative intend can be determined from the descriptions of other districts, the 10.11% population disparity among districts other than 70 AD noted by Dr. Quinn is reduced only slightly to 10.07%.
>
> 'The Assembly has sought to evade judicial enforcement of one-man-one-vote requirements applicable to state legislative districts by making unverifiable claims about a poorly defined version of the districts which has no legal status.'

> "[However,] neither the Legislature nor the California Supreme Court has authorized the revised version of the assembly districts which the Assembly is trying to defend." (13 Record 150.)
>
> "Plaintiff supplied a detailed affidavit to back up his population analysis. See 13 Record 178-200. In opposition to reconsideration the Assembly provided no figures at all, only this bare statement:
>
> > 'We add only that Plaintiff's tedious analysis of the Quinn affidavit and his argument that the corrections to the 1982 districts were not authorized is irrelevant.' (13 Record 440.)
>
> "The District Court's reaction to Plaintiff's pointing out and verifying documentation which the Court had overlooked was to wait for a year after briefing on reconsidering the Assembly's summary judgment had been completed, then pretend that this briefing had never occurred and dismiss the whole action sua sponte."

18.15 Plaintiff rebuts this misrepresentation at 12 Record 351-354: "Plaintiff used the Assembly's own affidavits to show that the population figures in Mr. Tucker's affidavits were unreliable. At 8 Record 166 Plaintiff cited the affidavit of Bruce Cain, special consultant to the Assembly Committee on Elections and Reapportionment, which was included in the Assembly's motion for summary judgment (see 8

Record 39):

> 'Dr. Cain admits that "In certain cases, it appeared necessary to split an enumeration district in order to ensure population equality among Assembly districts. Such splits are inherently somewhat imprecise, because one cannot be sure of the population in each half after the split." Dr. Cain does not specify the number of instances where populations were estimated for split units or the procedure which was used for these estimates. In his analysis of split population units in the congressional plan Plaintiff has demonstrated (1 Record 121) that misallocation of populations by as little as 10% can create serious errors in population computations. Dr. Cain notes that only four of the split population units in the A.B. 300 assembly districts could be reunited "without upsetting the balance of population equality," so it is clear that the population figures supplied by James Tucker are untrustworthy if only for this reason alone.'

"Plaintiff has also provided a declaration (see Exhibit C-2 of inclusive complaint) by T. Anthony Quinn, the chief reapportionment consultant of the Assembly minority which demonstrates the unreliability of Mr. Tucker's population figures. Dr. Quinn notes that even under generous assumptions (which

Plaintiff has shown are not true)

> 'The total range of deviation is at least 6.7% (the smallest district is the AD 78 with a population deviation of -3.6% and the largest district is the AD 25 with a population deviation of +3.1%).'

See 4 Record 7. The Tucker declaration claims a total range of deviation of only 3.9%. At 8 Record 165-166 the reason for the discrepancy is noted:

> 'In Exhibit C-2 (1 Record 274) to Plaintiff's inclusive brief Dr. Tony Quinn points out that the assembly districts in A.B. 300 were drawn using precincts rather than census population units as the original data base. This procedure maximizes the accuracy in determining the political complexion of districts but drastically increases the number of population errors, since population units divided between precincts may be lost track of and consequently be partially omitted or included twice.'

"Dr. Quinn's version of the population of 25 AD, one of the districts where his disagreement with the Tucker declaration is the greatest, is supported by figures from the Rose Institute, as Plaintiff noted at 4 Record 10:

> 'The 25 A.D. may be taken as an example of what discrepancies may exist, since it was involved in a dispute over Voting Rights Act compliance so the Rose Institute carefully

> checked the census units assigned to it by A.B. 300 and Mr. Remcho's corrections list. The Rose Institute determined that this district's population is 304,975 (cf. "Redistricting California 1981: Statistics"). In Exhibit A [the Tucker declaration] the population listed for 25 A.D. is 300,093 -- almost 5,000 less than the Rose Institute figure which places this district more than 3% above the ideal Assembly district population.'

Plaintiff noted (at 8 Record 170-171) that it was impossible to demonstrate what the correct population of 25 AD was because the Assembly refused to supply basic population data and the district included divisions of census tracts along lines other than those used in census tabulations. (One of these lines was along a highway as it had existed ten years before.) At 8 Record 169-170 Plaintiff quoted his earlier challenge to the validity of the Assembly's population figures at 4 Record 10 and noted: 'Even though the Assembly is now moving for a summary judgment it has never sought to rebut this or any other of Plaintiff's criticisms of statistics supplied by the Assembly.'

"The Court does not explain how it concluded that the affidavits—of Bruce Cain and Tony Quinn and the population figures from the Rose Institute did not at least cast doubt on the accuracy of the populations attested by James

Tucker and thus require that summary judgment be denied."

18.16 Plaintiff argues in support of reconsideration (at 12 Record 313-314):

"In actuality, in discussing the fact that the California Supreme Court had allowed an average deviation of only 2,300 in California senate district populations Plaintiff has argued that

'it is easily demonstrated that the Senate's districts are especially vulnerable on equal protection grounds due to their large populations and correspondingly large deviations from population equality.

"[O]ne reason advanced by the U.S. Supreme Court in White v. Weiser [(1973) 412 U.S. 783, 790] for requiring stricter population equality standards for congressional districts was because an ideal congressional district generally had a much larger population than a typical legislative district. California state legislative districts are, perhaps, the only exception to this generalization." Legislature v. Reinecke IV (1974) 10 Cal. 3d 396, 411.

This consideration is also noted as relevant in defining the reasonable population equality requirements of

Article XXI. See 64 Cal.Ops. Atty.Gen. 597, 606. The absolute size of senate district population disparities is an even stronger consideration following the 1980 census, for a California senate district now has an ideal population more than 10% larger than a California congressional district. While the precise mathematical equality standard for congressional districts is not applicable to California's senate districts, neither are the percentage deviations allowed in other states with smaller district populations.' 10 Record 204-205. Emphasis added.

18.17 Plaintiff argues in support of reconsideration at 12 Record 316-320:

"At [12 Record 250] the order cites Brown v. Thomson (1983) 103 S.Ct. 2690 in support of the proposition that an average deviation of 6,000 among senate district populations where most districts with Democratic incumbents have smaller populations than districts with Republican incumbents is not unconstitutional. However, in Brown v. Thomson the Court ruled only that a deviation from the ideal population of 4,413 for the only district involved in the litigation did not unconstitutionally dilute the voting power of the other 62 districts. Permitting Niobrara County to have its own representative did not violate the Equal Protection Clause of

the Fourteenth Amendment because the resulting increase in the average population of the remaining districts was only 71 persons or 0.96% of the ideal district population.

"In Brown v. Thomson the opinion notes,

> 'In Reynolds v. Sims, 377 U.S. 533, 568, 84 S.Ct. 1362, 1385, 12 L.Ed.2d 506 (1964), the Court held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." This holding requires only "that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable," for "it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." Id., at 577, 84 S.Ct., at 1390. See Gaffney v. Cummings, 412 U.S. 735, 745-748, 93 S.Ct. 2321, 2327-2329, 37 L.Ed.2d 298 (1973) (describing various difficulties in measurement of population).
>
> 'We have recognized that some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives such as "maintain[ing] the integrity of various political subdivisions" and "provid[ing] for compact districts of

> contiguous territory." Reynolds, supra, 377 U.S., at 578, 84 S.Ct., at 1390. As the Court stated in Gaffney, "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." 412 U.S., at 749, 93 S.Ct., at 2329.
>
> 'In view of these considerations, we have held that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." Id., at 745, 93 S.Ct., at 2327.' Id. at 2695-2696.

Since the Census Bureau uses population units of approximately the same size everywhere in the country, a given numerical disparity from the ideal district population necessitated by using these units of 'raw population figures' will constitute a larger percentage of the ideal district population in a state like Wyoming (where the average district contains 7,337 people) than in California (where the districts are 40 or 80 times as large). Thus districts 'as nearly of equal population as practicable' will be much

closer to the ideal in terms of percentage deviation in California than in Wyoming, and a given percentage of deviation which is acceptable in Wyoming may represent constitutionally unacceptable variation in California because in California it is practicable to reduce population disparities simply by shifting census tracts between districts.

"The Brown opinion does note that

> 'Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. See, e.g., Connor v. Finch, 431 U.S. 407, 418, 97 S.Ct. 1828, 1835, 52 L.Ed.2d 465 (1977); White v. Regester, 412 U.S. 755, 764, 93 S.Ct. 2332, 2338, 37 L.Ed.2d 314 (1973).' Id. at 2696.

But this means simply that a plaintiff bears the burden of demonstrating that population disparities constitute invidious discrimination rather than the state's bearing the burden of justifying the disparities. In fact, the Brown opinion states:

> 'This does not mean that population deviations of any magnitude are acceptable. . . . It remains true . . ., as the Court in Reynolds noted, that consideration must be given "to the character as well as the degree of deviations from a strict population basis."

> 377 U.S. at 581. The consistency of application and the neutrality of effect of the nonpopulation criteria must be considered along with the size of the population disparities in determining whether a state legislative apportionment plan contravenes the Equal Protection Clause.' Id. at 2697.

"In short, Brown v. Thomson (1) contains nothing which retreats from the holding of Gaffney v. Cummings supra that the absolute size of the maximum population deviation from the ideal counts along with the maximum percentage deviation among the factors determining the prima facie threshold which shifts the burden of proof regarding the constitutionality of population disparities among state legislative districts; (2) strengthens the holding of White v. Regester supra that the average deviation from the ideal is more important than the maximum deviation in determining whether the prima facie threshold has been reached; and (3) greatly reinforces the holding of Roman v. Sincock (1964) 377 U.S. 695, 710 that population disparities must be 'free from any taint of arbitrariness or discrimination.'

"The concurring opinion of Justices O'Connor and Stevens, who cast the deciding votes in Brown v. Thomson, stresses that 'the maximum deviation figure is not the controlling element in an apportionment challenge' 103 S.Ct. at 2699."

18.18 Plaintiff recounts (at 17 Record 108-109) his actual position on the constitutional significance of the absolute size of state legislative district population disparities:

"In his opposition (at 8 Record 159-160) to the Assembly's motion for summary judgment Plaintiff quoted Legislature v. Reinecke IV (1973) 10 Cal.3d 396, 411:

'"Although a greater percentage variation has been permitted in the reapportionment plans of other states (see Regester, Gaffney and Mahan supra) legislative districts in California are large, so that even a 1% or 2% variance in population affects a large number of persons. The variance in the number of persons more directly relates to the practical attainment of numerical equality than does a percentage figure, and districts can be formulated in California pursuant to other criteria recommended without deviating from the ideal by more than 1%, except in unusual circumstances."

'It should be noted that Reinecke IV was handed down before either Article I § 7 or Article XXI was added to the California Constitution; thus the population standard embraced by the Reinecke court is an adaptation of federal

standards to California circumstances as is required by Swann v. Adams [(1967) 385 U.S. 440], not a decision based on California law.'

"In Plaintiff's Second Amended Complaint (at 4 Record 73) he notes: 'The "special circumstances" exception was seldom applied by the court in Reinecke, and the average deviations for Senate and Assembly were 0.46% and 0.58%.'

"[Thus] Plaintiff contends that the 3.92% maximum population disparity and the 0.99% average deviation claimed by the Assembly are about twice as large as are constitutionally acceptable under California circumstances . . . ."

18.19 Plaintiff's complaint also challenged the constitutionality of the malapportioned Board of Equalization Districts, stating at 4 Record 71: 9-15,

"Plaintiff's own Board of Equalization district and the adjoining district both deviate from the ideal population by about 800,000 people. The Secretary of State urged the California Supreme Court to apply the principles of Assembly v. Deukmejian supra and require Board of Equalization redistricting according to the 1980 census. The Court refused to do this or to explain its reason for not doing so."

18.20 Neither the Court of Appeals nor any of the defendants has pointed to any granting or denial of

injunctive relief which "rests upon resolution of the merits of the constitutional claim presented below" which is necessary under MTM, Inc. v. Baxley (1975) 420 U.S. 799, 804 to provide a foundation for a direct appeal pursuant to 28 U.S.C. § 1253. If the District Court had rejected "Plaintiff's motion for a preliminary injunction requiring special interim elections throughout the State of California on November 8, 1983" (mentioned by the order of March 27, 1984 at 12 Record 235) rather than delaying action until this proposal had become moot, a finding that "the districts used for the Assembly elections were, in fact, constitutional" might well have been the basis for such a rejection. However, no post hoc determination of the constitutional merits of an injunctive proposal that had been moot for 4½ months could have been taken to the High Court, since as Herb v. Pitcairn (1945) 324 U.S. 117 and many subsequent cases have affirmed, "Our power is to correct wrong judgments, not to revise opinions."

18.21 Plaintiff notes the relevant prior rulings on this point at 17 Record 118-119:

"No one challenged Plaintiff's right to file his supplemental complaint, and when in December 1983 Plaintiff filed proposals for injunctive relief directed to the 1984 elections based on the perpetuated constitutional flaws noted in his August 1983 supplemental complaint,

neither the Court nor any defendant challenged his right to do so.

"But the order of March 27, 1984 ruled that Plaintiff's March 11, 1982 inclusive brief had exhausted his right to unilaterally amend his complaint and therefore refused to recognize his August 1983 supplemental complaint. The order then 'declines to take cognizance of the Plaintiff's motions that seek an adjudication of the districts created by the 1983 redistricting plan . . . [because] Plaintiff is not free to seek an adjudication of disputes not fairly presented by the complaint.'

"The issue arose because at the beginning of the lawsuit Plaintiff had mistakenly labeled a document designed to facilitate early intervention by parties to Assembly v. Deukmejian as an 'Amended and Inclusive Complaint.' This document was served on those parties following Plaintiff's filing of his opening complaint. The opening complaint was 17 pages long and simply provided a concise statement of each of Plaintiff's claims; the inclusive brief interspersed these identical claims with 200 pages of supporting citations and documentation to make all potential intervenors aware of the scope of this action and to facilitate the prompt adjudication required by 28 U.S.C. § 2284.

"The order of March 27, 1984 changes its definition of Plaintiff's March 11, 1982 inclusive brief in different contexts. When served on the California Supreme

Court it was ruled to be not really a complaint because it was too bulky: 'the document bears a passing resemblance to a complaint, though it can hardly be characterized as a short and plain statement of the facts entitling the pleader to relief.' Yet the same document was enough of a complaint in the eyes of the Court to exhaust Plaintiff's right to unilaterally amend. Plaintiff had no way to anticipate such a ruling, since the order of July 1, 1982 had determined that the inclusive brief was not really a complaint: 'A complaint may not properly double as an inclusive brief.' (4 Record 56.)

"Thus the issue of whether Plaintiff had a right to bring the 1983 districts before the Court became a shell game in which the Court (a) refused to consider the State Supreme Court properly joined because the document served upon it was too bulky to be a complaint, and yet (b) refused to consider the districts perpetuating for the rest of the decade the constitutional defects alleged in Plaintiff's original complaint because the document served on the State Supreme Court was a unilaterally amended complaint."

18.22 Plaintiff notes the Board of Equalization motions which the Court has refused to rule upon at 17 Record 116-117:

"On December 6, 1983 Plaintiff proposed (at 10 Record 28-29):

'Should the 1982 redis-

> tricting plans be determined not to be unconstitutional in their entirety, special elections should still be held in those districts where constitutional flaws demonstrably changed the outcome as required by California Elections Code § 20024. See 6 Record 73-79 for recommended replacement districts. Because of the extreme closeness of the Collis-Ivers Board of Equalization contest [and the malapportioned districts used for the 1982 BOE elections] a new election should also be held for this office, using the district in A.B. 2X with the most population in common with the 1982 district.'

This proposal was repeated (at 12 Record 157-158) in Plaintiff's March 13, 1984 'Motion for Special Elections Where Constitutional Flaws in Districts Used in 1982 Demonstrably Changed the Elections Outcome.'

"Plaintiff has also provided an updated 'Revised Motion for Injunctive and Declaratory Relief Regarding Board of Equalization Claim' (16 Record 60-74) and requested that even if no one is required to defend against this claim, the Court at least ought to rule on it.

"None of Plaintiff's pleas to the District Court has dislodged the Court from its posture of total silence on his BOE claim."

18.23 Plaintiff notes (at 17 Record 114) the Court's subsequent refusal to enforce this briefing order:

> "Plaintiff filed the requested declarations, providing a detailed, tract-by-tract documentation of congressional district populations in the districts with the largest population disparities. See 12 Record 477-542. Defendant, however, simply refused to respond in accordance with the Court's briefing schedule. Plaintiff filed a motion seeking to force her to respond to his congressional motion (13 Record 144, 166-170), and briefing on this motion (13 Record 446-448, 488) was completed on August 3, 1984. However, the District Court took no action in response to this briefing and 11 months later issued its sua sponte ruling declaring the entire case terminated."

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judges Kennedy, Karlton and Ramirez

Item #19a (13 Record 282-284)

Filed June 25, 1984

This court is in receipt of certain motions filed by the plaintiff on June 13, 1984; these motions appear to request reconsideration of the court's earlier order of March 27, 1984, which granted the defendant-intervenor Senate's motion to dismiss and the defendant-intervenor Assembly's motion for summary judgment.[19.01] The plaintiff calendared these motions for hearing on Monday, July 16, 1984, a day upon which the Honorable Lawrence K. Karlton, Chief Judge of the United States District Court for the Eastern District of California, and the judge to whom responsibility for proceedings under 28 U.S.C. § 2284(b)(3) has been assigned, regularly conducts law and motion. The motions, however, are not the sort of motions which may properly be considered by a single judge of a three-judge panel. The court can only surmise that plaintiff's calendaring

of these motions on Judge Karlton's regular law and motion calendar was prompted by the notices issued by the Clerk's Office upon receipt of certain motions filed by the plaintiff on April 10, 1984. Those motions, however, did involve matters properly heard and decided by a single judge of a three-judge panel.[19.02]

Good cause appearing therefor,

IT IS HEREBY ORDERED that the plaintiff's motions filed on June 13, 1984, be, and the same hereby are, vacated from the court's calendar;

IT IS HEREBY ORDERED that the defendant and defendant-intervenors file such response as any may have to these motions on or before Monday, July 23, 1984;

IT IS FURTHER ORDERED that the plaintiff may, but need not, file any reply he may wish to make to such

opposition as is filed by the defendant and defendant-intervenors on or before Monday, August 6, 1984;

IT IS FURTHER ORDERED that the plaintiff's motions filed June 13, 1984, shall be deemed submitted on the moving and responding papers as of Monday, August 6, 1984, E.D. Cal.Local Rule 113 (g), Morrow v. Topping, 437 F.2d 1155 (9th Cir. 1971);

IT IS FURTHER ORDERED that the plaintiff file within twenty-one (21) days of the date of this order a Notice of Motion regarding his motions filed on April 10, 1984, calendaring them for hearing by Judge Karlton on any of Judge Karlton's regularly scheduled law and motion days. Failure to file a Notice of Motion will result in an automatic withdrawal of the motions.

IT IS SO ORDERED.

/s/ Lawrence K. Karlton, Chief Judge
United States District Court

/s/ Anthony M. Kennedy, Judge
United States Court of Appeals
for the Ninth Circuit

/s/ Raul A. Ramirez, Judge
United States District Court

Dated: [No date.]

Plaintiff's Contextual Footnotes:

19.01 Plaintiff discusses the background of problems relating to the filing of motions at 17 Record 122-125:

"Plaintiff's effort to secure action on his reconsideration, joinder and leave to amend motions arising from adverse rulings in the order of March 27, 1984 became the focus of yet another procedural controversy.

"Must of the controversy arose from the fact that at no point in this litigation did the District Court ever establish a procedure for noticing motions. Judge Karlton's order of July 1, 1982 notes that all further proceedings will be presided over by a three-judge court, but that court never established a calendar; parties were simply expected to file motions which the Court would decide what to do with after the fact.

"For example, when the Assembly lodged its summary judgment motion after the February 16, 1983 hearing its so-called 'Notice of Motion' consisted of:

'Hearing Date:

'Hearing Time:

'TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

'Notice is hereby given that on _____, 1983, at _____ .m., Defendant-Intervenor Assembly of the State of California will appear before the panel of Judges designated in this case, in the courtroom usually occupied by them

> [address of courtroom], and then and there move [nature of motion and supporting memoranda].' (See 8 Record 15-16.)

This motion was put forward by the Assembly 'out of the blue' but was taken cognizance of by the Court and subsequently granted. Plaintiff followed this same form in submitting his motions arising from the order of March 27, 1984, but his motions were soon immersed in the procedural quagmire described in this section.

"Since the District Court waited until the 1984 elections process was well underway before filing its order pursuant to a hearing held more than a year before, Plaintiff tried to secure immediate consideration of his motions by filing supporting memoranda (12 Record 257-279, 280-287 and 305-383) before the April 20 deadline for filing proponents' briefs which had been established by the order of March 27. Plaintiff also urged the Court to order completion of briefing for his motions according to the remainder of the schedule the Court had set in the order of March 27 for motions relating to Plaintiff's congressional claim. (12 Record 385-386.)

"But Plaintiff's joinder and leave to amend motions were rejected by a deputy clerk who typed the following on the bottom of a form which cited the filing requirements of Local Rule 113(b):

> 'Pursuant to Rule 28 U.S. C. 2284 B(3) please notice

before Judge Karlton. Forthcoming Law and Motion dates for Judge Karlton are June 4 and June 18, 1984.'

"This notice did not take cognizance of the filing procedure that had been agreed upon at the December 6, 1982 status conference. At that conference Plaintiff raised the issue of a potential conflict between Local Rules for filing and hearing motions and the expedited hearing requirement of 28 U.S.C. § 2284.

'MR. HALLIWELL: All right. The first one has to do with the seating of the two senators from the odd districts that have elections allegedly two years early. They are now ensconced in Sacramento. Those districts now have two senators and the Democrats are now making noises about having a special session on redistricting trying to make this whole thing moot by adopting the 1984 districts in the next three or four weeks before this Court has had a chance to adjudicate the fact whether the [1982] election was in fact conducted constitutionally. If in fact a special --

'THE COURT: Just tell me what you want. I don't want a speech Mr. Halliwell.' (Hearing Transcript at 14-15.)

'MR. HALLIWELL: I will conform to whatever procedures the Court advises I must. I'm

apparently relying on the Section 2284(b)(2) that called for hearings at the earliest possible date, and I tried in vain to arrange them, rather than setting something on the motions calendar which throughout this case, I have been very reluctant to wait an additional six or seven weeks. As time goes on, everything gets less and less feasible as far as the time frame --

'THE COURT: You know, Mr. Halliwell, I want to tell you, this is not the only case in my court, much less Judge Ramirez's court, much less Judge Kennedy's court. You invoked the process of the three-judge court. It is cumbersome, it is difficult, we do the best we can.' (Hearing Transcript at 15-16.)

'[MR. HALLIWELL]: The Court in the past has taken a position that it can't be my lawyer, therefore I make a mistake, therefore the Court ignores what I'm trying to do. From time to time, the statutes happen to be on my side. We have a recent example right now that you have told me I've got to wait on other business to get on the motion calendar. That can be a direct contradiction to 2284(b)(2).

'THE COURT: Mr. Halliwell, I didn't tell you you had to get on our regular law and motion calendar. I told you you

have to make a motion and get a date.' (Hearing Transcript at 19.)"

19.02 Plaintiff notes the details of the handling of these motions at 17 Record 126:

"Before any further action was taken on this question, Plaintiff's congressional motion, which was explicitly subject to the March 27 order's briefing schedule, was also sidetracked. Defendant at first claimed to have overlooked Plaintiff's motion and then simply refused to file her opposition. (See 13 Record 98-101, 110-129.) Since the schedule set by the order of March 27 was thus nullified, Plaintiff then filed a motion to establish a new briefing schedule for all pending motions (13 Record 102-109). This motion was ignored by the Court. On June 9, 1984 Plaintiff submitted a motion seeking to force Defendant to respond to his congressional motion and updating his motions for reconsideration of the dismissal of his state legislative claims.

"On June 25, 1984 the full Court filed an order (Item #19) which ruled that Plaintiff's motions for leave to amend his complaint and for joinder of the California Supreme Court 'did involve matters properly heard and decided by a single judge of a three-judge panel' and required 'calendaring them for hearing by Judge Karlton on any of Judge Karlton's regularly scheduled law and motions days.' (See 13

Record 283-284.) The first available date on Judge Karlton's calendar was August 27, 1984, so Plaintiff had to wait til that date for these motions to be heard.

"The order of June 25 also claimed that Plaintiff had placed his motion for reconsideration of the dismissal of his state legislative claims on Judge Karlton's calendar. Actually this had been done by a court employee who had filled in a date on Plaintiff's notice of motion without consulting or informing Plaintiff."

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judges Kennedy, Karlton and Ramirez

Item #19b (13 Record 333-334)

Filed July 3, 1984

The court has received Notice of Motion and Motion, a Memorandum of Points & Authorities, and a Declaration from the plaintiff, whereby the plaintiff moves the court for injunctive relief requiring special remedial elections in certain senatorial districts.[19.03] The court has determined that it will not be assisted by oral arguments.

Good cause appearing therefor,

IT IS HEREBY ORDERED that the motion be deemed submitted on the moving and responding papers,[19.04] E.D. Cal. L.R. 113(g); Morrow v. Topping, 437 F.2d 1155 (9th Cir. 1971), and

IT IS FURTHER ORDERED that the responding and reply papers[19.05] be filed in accordance with the briefing schedule established by the court in its Order of June 25, 1984.

IT IS SO ORDERED.

/s/ Anthony M. Kennedy, Judge
United States Court of Appeals
for the Ninth Circuit

/s/ Lawrence K. Karlton, Chief Judge
United States District Court

/s/ Raul A. Ramirez, Judge
United States District Court

Dated: June 28, 1984

Plaintiff's Contextual Footnotes:

19.03 Plaintiff notes the reason why this motion was necessary at 7 Record 127-128:

"The order of March 27, 1984 also denied Plaintiff's motion for injunctive relief from senate district misnumbering, and Plaintiff sought to appeal this denial. The order had ruled that Plaintiff's proposed remedy would be unduly disruptive since the target election date was already so close, and by the time the Court reporter had prepared a transcript of the February 16, 1983 hearing needed for appeal, Plaintiff's proposed special election date of June 5, 1984 had passed. Plaintiff therefore submitted an updated remedial proposal directed against the continuing effects of senate district misnumbering in 1 SD, 6 SD, 11 SD, 12 SD, 13 SD, 32 SD, and 37 SD. (See 13 Record 209-271.) In its order of July 3, 1984 (Item #20) the full Court required 'that the responding and reply papers be filed in accordance with the briefing schedule established by the Court in its order of June 25, 1984.' (see 13 Record 333-334.)

"The Senate refused to contest the feasibility of Plaintiff's revised remedies. Instead the Senate argued (at 13 Record 413-420) that Plaintiff's notice of appeal deprived the District Court of jurisdiction to consider a revised remedy to replace the one which became obsolete due to the delay in

transcript preparation by Judge Karlton's court reporter. Plaintiff replied in rebuttal (at 13 Record 482-487) that Supreme Court Rule 44.4 required that a revised remedy be ruled on in the first instance by the lower court and noted:

> 'Indeed, the Assembly insisted on October 29, 1982 that a proposal for injunctive relief similar to that rejected by this court on October 27, 1982 be also submitted to this court before the proposal could serve as a proper vehicle for an appeal: the Assembly argued,
>
> > "[Plaintiff] proposes that the elections be held but the results not be announced. This latter request was not even presented to the District Court and is therefore not appropriate for review in the United States Supreme Court. Rule 44.4"
>
> 5 Record 488.'

(13 Record 483.)"

19.04 Plaintiff discusses the major issue raised in briefing at 13 Record 486:

> "At [13 Record 416] of the Senate's injunction opposition the Senate notes:
>
> '[P]laintiff's "supporting memorandum" consists almost solely of verbatim quotes from the colloquy occurring between the Court and various counsel during the February 16 hearing on plaintiff's prior application for injunctive relief.'

Plaintiff hoped, by drawing attention the Senate's evasiveness at the hearing on senate district misnumbering, to elicit some response by the Senate to the aspects of the case which the Senate has sought to obscure. Not only has the Senate continued to refuse to address the substance of the Court's inquiries, it has completely stalemated analysis of the populations of the contested senate districts by withholding population data under its sole control."

19.05 Plaintiff complains of the "Lack of Meaningful Response by Senate to This Court's Request for Briefing" at 13 Record 487:

"Since the Court did not follow Plaintiff's suggestion (at [13 Record 239] of Plaintiff's memorandum supporting his revised motions for injunctive relief from senate district misnumbering) that it rule immediately on his proposals for remedial special elections the Court must have expected the Senate to respond to the Court's request for briefing with (a) some clarification of the Senate's evasive posture at the February 16, 1983 hearing, (b) some comment by the Senate on Plaintiff's evidence of senate district misnumbering (since the Senate had previously claimed an absence of such evidence), or (c) some comment by the Senate on the specifics of Plaintiff's special election proposals. The failure of the Senate to file any meaningful response indicates more clearly than ever that

the contested senate districts are indefensible and therefore the Senate still hopes to merely continue to delay these proceedings until injunctive relief is no longer feasible."

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Halliwell v. Eu C.A. 84-1859

Before Clerk Phillip B. Winberry

Item # 20 (18 Record 109-133)

Plaintiff's Procedural Appeal[20.01]

Filed April 24, 1984

Plaintiff's Contextual Footnote:

20.01 This attempted appeal was filed after a delay in transcript preparation required Plaintiff to limit his appeal from the order of March 27, 1984 to non-injunctive issues. The background and contents of C.A. 84-1859 and the Ninth Circuit's refusal to take cognizance of it are described in Part II, Section D of Plaintiff's April 29, 1987 memorandum to the Honorable James R. Browning, Chief Judge of the United States Court of Appeals for the Ninth Circuit. The text of this section follows.

D. Plaintiff's Procedural Appeal to the Ninth Circuit

1. Circumstances Justifying Plaintiff's Appeal

Since the refusal of the District Court to act on Plaintiff's revised injunctive proposal blocked any appeal to the U.S. Supreme Court under 28 U.S.C. § 1253, Plaintiff appealed the District Court's refusal to act. As the Fifth Circuit affirms in Hall vs. West, District Judge (1964) 335 F.2d 481, 485 it is the responsibility of the Court of Appeals to rectify the sort of delaying tactics employed by the District Court in Halliwell v. Eu.

Since the 1984 elections process made prompt action necessary, Plaintiff vigorously pressed his procedural appeal to the Ninth Circuit. Thus in his April 24, 1984 "Supplement to Notice of Appeal" Plaintiff acknowledges that "the Ninth

Circuit has assigned the docket number 84-1859 to the aspects of Plaintiff's appeal within its jurisdiction, and Plaintiff herewith tenders the $65 docket fee required by the Ninth Circuit." (12 Record 406.) On June 13, 1984 the Clerk of the District Court certified the record and notified the Court of Appeals so they could establish a briefing schedule. See 13 Record 277.

Because Plaintiff alleged deliberate misconduct rather than a good-faith misinterpretation of procedural rules, the accused judges had the greatest potential stake in Plaintiff's appeal, so his supplement to Notice of Appeal provided them with a detailed statement of charges and specifications. See 12 Record 409-420 and 12 Record 421-428.

2. Misconduct of Judges Kennedy, Karlton and Ramirez

Count I (12 Record 409-416) of

charges and specifications against Judges Kennedy, Karlton and Ramirez is their "Refusal to Apply Standards Mandated by the U.S. Supreme Court Governing Jurisdictionally Substantial Claims."

Plaintiff contends as follows.

(1) Judge Karlton denied the actual dismissal motions presented to him and rejected all of Defendants' grounds for challenging Plaintiff's complaint, yet launched a wholly different, unnoticed sua sponte attack on Plaintiff's case, saying:

> "[T]hese motions do not fatally pierce the Plaintiff's lawsuit. They are, however, a useful tool with which to hack away the necrotic claims and attached allegations, arguments, innuendo, and creative legal theories which form the bulk of this massive, sprawling complaint. In this manner I hope to reveal whether there is any living tissue consisting of cognizable constitutional claims buried within this great flaccid carcass." (4 Record 42-43.)

Count I also alleges the following.

(2) Judge Karlton ruled out damage to Plaintiff's political rights arising from due process violations in the California Supreme Court's selection of redistricting plans as a viable claim "even if California is depriving the Plaintiff of an interest protected by the Fourteenth Amendment" (4 Record 60).

(3) Judge Karlton ignored the fact that Plaintiff's rights under state law were denied on federal grounds and brushed aside the whole concept of pendent jurisdiction which according to Schmidt (73 L.Ed.2d 245) requires consideration of dispositive state-law claims; Judge Karlton ruled in his order of July 1, 1982:

> "rights under state law exist only to the extent that the state supreme court recognizes their existence; this court cannot create rights in the Plaintiff based on state law beyond those recognized by the final arbiter of state law." (4 Record 60.)

Judge Karlton also said,

> "Put bluntly: whether the decision in Assembly v. Deukmejian accords with California law is not and cannot be a matter of concern to this court." (4 Record 59.)

(4) Judge Karlton ruled out a claim based on damage to Plaintiff's own political effectiveness arising from ethnic gerrymandering because

> "Whatever the merits of his claim of unlawful political discrimination against persons of color, the Plaintiff simply lacks standing to press that claim." (4 Record 47.)

The order brushes aside the whole concept of jus tertii standing as expounded in Craig v. Boren (1977) 429 U.S. 190, the fact that injury to whites arising from discrimination against blacks has been cognizable since Barrows v. Jackson (1953) 346 U.S. 249, and the mandate of Rose v. Mitchell (1979) 443 U.S. 545, 555-556 that no injury to a litigant need be shown if the discrimination produces serious harm to the public interest. In

Rose v. Mitchell the opinion notes that racial discrimination in governmental processes produces this sort of harm.

> "Discrimination on the basis of race [which is] odious in all respects is . . . . 'at war with our concepts of a democratic society and a representative government.' [citation] and 'there is injury . . . to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.' [Citation.]"

(5) Judge Karlton invoked Gaffney v. Cummings, 412 U.S. 735, 752-55 (1973) to exclude from consideration "political gerrymandering that invidiously discriminates against the members of [Plaintiff's] political party" because (as the order of July 1, 1982 interprets Gaffney supra)

> "the partisan drawing of districts in a manner designed to maximize the strength of the majority political party does not in itself give rise to a claim cognizable by this court." (4 Record 47-48.)

However, maximizing Democratic strength inevitably minimizes Republican strength,

and Gaffney supra simply allows states "to allocate political power to the parties in accordance with their voting strength" and precludes invalidation of a redistricting plan

> "because it undertakes not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the state."

(6) Judge Karlton dismissed Plaintiff's claims based on the guaranty of a republican form of government provided to the states by Article IV § 4 of the U.S. Constitution. Plaintiff's invocation of the Guaranty Clause in defense of the referendum provisons of the California Constitution is squarely supported by Chisholm v. Georgia (1793) 2 U.S. 419, 448, 456-457 and In re Duncan (1891) 139 U.S. 449, 461, which identify effective popular sovereignty and fealty to a written constitution as essential in-

gredients of a republican form of government. Baker v. Carr (1962) 369 U.S. 186 clearly affirmed that the political question doctrine was applicable only to issues involving conflict among the branches of the federal government. "[It is] not the federal judiciary's relationship to the states which give rise to the 'political question.'" Id. at 210. And in Reynolds v. Sims (1964) 377 U.S. 533 the Court affirmed that only some Guaranty Clause claims were nonjusticiable.

> "As we stated in Baker v. Carr SOME questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards." Id. at 582. Emphasis added.

However, the order of July 1, 1982 makes no attempt to assess the justiciability of Plaintiff's Guaranty Clause claims but simply states: "This court lacks jurisdiction over the subject matter of

Guaranty Clause claims." (4 Record 51.)

Count I also includes "refusal by the full panel to reconsider Judge Karlton's exclusions in the light of applicable standards." Plaintiff contends the following.

(7) Goosby v. Osser (1973) 409 U. S. 512, 518 limits dismissal at the pleading stage to claims whose "'constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' [citation]; 'wholly insubstantial,' [citation]; 'obviously frivolous,' [citation]; and 'obviously without merit' [citation]."

(8) The full panel has simply ignored Plaintiff's motions (a) at 7 Record 59-67 challenging the order of July 1, 1982 on procedural grounds, and (b) seeking to reinstate his state constitutional claims (at 7 Record 68-86), (c) his Due Process of law claims (at 7 Record

87-98), (d) his ethnic gerrymandering claims (at 7 Record 99-105), (e) his partisan gerrymandering claims (at 7 Record 106-109) and (f) his Guaranty Clause claims (at 7 Record 110-112). In its only discussion of any of Plaintiff's excluded claims the full panel misconstrued Plaintiff's partisan gerrymandering claims as requiring proportional representation for Republicans (this claim actually attacks systematic dilution of Republican voting strength by means of distended districts which pack as many Republican areas as possible into a few districts) and his Guaranty Clause claims as requiring a restructuring of state government (this claim actually challenged the wholesale abrogation of provisions of the California Constitution).

Count II (12 Record 416-420) of charges and specifications against Judges

Kennedy, Karlton and Ramirez is their "protracted delays in adjudication."

Plaintiff contends the following.

(1) At the outset of proceedings Defendant was allowed to mount a series of frivolous challenges to the adequacy of service which delayed any action for two-and-a-half months even though none of these challenges alleged any prejudice to Defendant's rights due to the alleged imperfections in the manner of service.

(2) In spite of Plaintiff's providing the Senate and Assembly with copies of his complaint and supporting authorities at the outset of proceedings Judge Karlton allowed (a) their two-and-a-half-month delay in intervention, (b) the Assembly's lack of preparedness when it did intervene, and (c) his own delay in ruling on intervenors' dismissal motions to consume more than half of the time before the General Elections that

had been available when Halliwell v. Eu was filed.

Count II also alleges the following.

(3) Judge Karlton (a) refused to clarify whether his exclusions of most of Plaintiff's claims would become permanent if they were not appealed within thirty days, (b) permanently enjoined Plaintiff from communicating with his law clerks as a punishment for trying to secure clarification of the order of July 1, 1982, and (c) refused to convene the three-judge panel appointed by Judge Browning so that it could act upon Plaintiff's motion to reconsider Judge Karlton's dismissals without leave to amend.

(4) The full court (a) refused to consider aspects of Plaintiff's case unrelated to Plaintiff's interlocutory appeal during the pendency of that appeal, (b) did not keep its pledge to schedule an expedited status conference

upon disposition of Plaintiff's appeal (see 5 Record 111) and (c) did not keep its pledge "to act promptly and expeditiously when it has regained jurisdiction over the lawsuit" (see 5 Record 186-187) but instead waited nearly four months before its first hearing on the merits of the case -- nearly one whole year after the lawsuit was filed.

Count II further alleges unconscionable delay after the panel's hearing of February 16, 1983.

(5) The panel refused to rule on the propriety of Judge Karlton's procedural conduct and Plaintiff's allegations regarding the damaging effects of Judge Karlton's continuing in operational control of proceedings, on the ground that (according to the order of April 19, 1983) "Plaintiff's displeasure with Judge Karlton's rulings does not provide a basis for his motion, even if those

rulings were legally erroneous." (8 Record 119.)

(6) The Court waited for more than a year after Plaintiff's motions for injunctive relief were submitted and argued, during which time Plaintiff's proposed remedies became obsolete, and then rejected them because (as the order of March 27, 1984 said) they were "obviously moot." (See 12 Record 255.)

3. Misconduct of Judges Wright and Hug

Since Circuit Judges Eugene Wright and Procter Hug, Jr. played a pivotal role in preventing any adjudication on the merits in Halliwell v. Eu Plaintiff's "Supplement to Notice of Appeal" included charges and specifications regarding their alleged misconduct.

Count I (12 Record 421-424) against Judges Wright and Hug is their "Refusal to Apply Standards Mandated by the U.S. Supreme Court Governing Interlocutory

Appeals."

Plaintiff contends as follows.

(1) In orders dismissing Plaintiff's appeal (C.A. 82-4453) seeking protection of his right to present his full case to a three-judge panel pursuant to 28 U.S. C. § 2284 Judges Hug and Wright proclaimed, "An order dismissing . . . part of a complaint with leave to amend is not a final appealable order." (5 Record 114) and, "[T]he dismissal with leave to amend in certain respect was not appealable. See Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (9th Cir. 1982); Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975)." (5 Record 197.) Judges Hug and Wright flatly refused to address the fact, pointed out by Plaintiff in his requests for reconsideration, that when a plaintiff challenges the dismissal of part of his complaint without leave to amend, leave to amend in certain other

respects does not affect the appealability of the denial of the right to amend.

(2) Even the supporting precedents cited by Judges Hug and Wright support the viability of Plaintiff's appeal. In Scanlon the Court of Appeals had ruled:

> "Ordinarily an order granting a motion to dismiss under rule 12 (b)(6) carries with it a right to amend under rule 15(a) and is thus not an appealable final judgment. Here, however, the ruling was on a ground not curable by amendment [so] . . . the order is appealable."

In Scott the Court of Appeals had ruled:

> "Even where amendment is not a matter of right 'leave to amend shall be freely given when justice so requires.' Fed.R.Civ.P. 15(a) . . . upon remand appellants should be allowed leave to amend. We therefore reverse the district court's dismissal of count three insofar as it denies leave to amend." 522 F. 2d at 1116.

Count I also alleges the following.

(3) The dismissal orders of Judges Hug and Wright simply ignored the aspect of Plaintiff's appeal wherein he alleged that Judge Karlton had exceeded his

proper jurisdiction by dismissing aspects of Plaintiff's case that had been affirmed as justiciable by the U.S. Supreme Court. Thus Judges Hug and Wright violated Baltimore Contractor Inc. v. Bodinger (1955) 348 U.S. 176, 181-182:

> "It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system."

The exclusion of viable claims by Judge Karlton also violated § 2284(b)(3), which states that "A single judge shall not . . . enter judgment on the merits" and Swift & Company v. Wickham (1966) 382 U. S. 111, 119: "[§ 2284] provides for three judges . . . to allow a more authoritative determination and less opportunity for individual predilection in sensitive and politically emotional areas . . . ."

Count I also charges Judges Hug and Wright as follows.

(4) They refused to terminate the

delaying tactics of the District Court by enforcing 28 U.S.C. § 2284(b)(2), which requires that a hearing on a statewide redistricting case "be given precedence and held at the earliest practicable day." Plaintiff's effort to secure enforcement of 28 U.S.C. § 2284 was brushed aside by Judges Hug and Wright with the non sequitur,

> "No departure from these principles of appellate jurisdiction is warranted merely because the proceedings on the amended complaint are now pending before a three-judge court. See Jacobs v. Tawes 250 F. 2d 611 (4th Cir. 1957)." (5 Record 197.)

Jacobs simply affirms that the same jurisdictional amount (which is inapplicable anyway to civil rights actions brought under 42 U.S.C. § 1983) is required whether an action is being adjudicated by a one- or three-judge district court.

Count II (12 Record 424-428) of charges and specifications against Judges

Hug and Wright is their "Obstruction of Plaintiff's Right to Appeal." Plaintiff contends as follows.

(1) Refusal by Judges Hug and Wright to allow forwarding of Plaintiff's October 18, 1982 en banc petition (the panel ruled at 5 Record 253, "Appellant's emergency request for en banc reconsideration of the September 28, 1982 order dismissing this appeal is denied as untimely.") was an unjustifiable usurpation of the prerogatives of the active-service judges of the Ninth Circuit, for several reasons: (a) This petition went beyond simply seeking reconsideration of the panel's prior order dismissing Plaintiff's appeal and included original aspects dealing with the rapidly approaching election, and Plaintiff's letter of conveyance noted his compliance with the Ninth Circuit's Local Rule 13(e)(2), which is all that is necessary to qualify

a petition as a suggestion that a hearing be held initially en banc (see 5 Record 175); (b) even if the October 18, 1982 petition did not qualify for hearing initially en banc, the fourteen-day period for reconsideration established by F.R. A.P. § 40(a) had not in fact run out, because the tolling of time was suspended by Plaintiff's October 4, 1982 request (5 Record 115-122) that Judges Hug and Wright reconsider their dismissal of September 28, 1982. As Wright & Miller note in Federal Practice and Procedures § 3986 at 473 n. 8:

> It is well established as to all types of cases . . . that the prescribed period for petitioning . . . starts with the entry of the lower court judgment; but if a timely rehearing petition if filed, that prescribed period is tolled and starts anew upon the entry of an order denying rehearing . . . . see, e.g. Department of Banking v. Pink, 1942, 63 S.Ct. 233, 317 U.S. 264, 87 L.Ed. 254." (Emphasis added.)

Judges Hug and Wright denied reconsider-

ation on October 22, 1982, so Plaintiff's en banc petition of October 18, 1982 came before the prescribed period for petitioning had even started. (c) F.R.A.P. § 35(b) provides in connection with a party's suggestion that an en banc hearing might be appropriate in his case that "The Clerk shall submit any such suggestion to the judges of the Court who are in regular active service." (Emphasis added.) In Western Pacific Railroad Corp. v. Western Pacific Railroad Co. (1953) 345 U.S. 247 the U.S. Supreme Court overruled an earlier attempt by two members of the Ninth Circuit to block transmission of a petition for en banc consideration, and this led directly to the revocation of a circuit's right under the former § 46(c) to allow a division of the court to decide whether en banc consideration was appropriate. Thus Shenker v. Baltimore & Ohio Railroad

(1963) 374 U.S. 1, 5 affirms that under § 35(b) "[E]very petition for rehearing is submitted to every member of the Court"; and (d) even if Plaintiff's en banc petition had missed a deadline for reconsideration by a matter of days, its subject matter, allegations of serious misconduct by a member of the Ninth Circuit, provided a sufficient reason for the Ninth Circuit to have taken action on this petition. See Sparks v. Duval County Ranch Co. (1979) 604 F.2d 976, 979.

Count II also alleges as follows.

(2) Plaintiff's inability to secure timely action by the District Court led to the following plea to the Ninth Circuit:

> "All Plaintiff seeks now from the Ninth Circuit, all that he has ever sought during the past 4½ months of trying to get the Ninth Circuit to exercise its lawful jurisdiction, is an order vacating the

> improper restrictions of Judge Karlton's order of [July 1, 1982] and a remand to the required three-judge panel for expedited proceedings as provided by 28 U.S.C. § 2284(b)(2)." (6 Record 222.)

To this Judges Hug and Wright replied:

> "Appellant's December 15, 1982 petition for reinstatement of this appeal is denied. In light of appellant's apparent unwillingness or inability to comprehend the limits on this court's jurisdiction noted in our prior orders, a detailed explanation of the errors in Appellant's latest petition would serve no useful purpose. We have considered Appellant's contentions, however, and find them devoid of merit.
>
> "The appeal has been dismissed, the mandate has been issued, and no further requests for reconsideration will be entertained. If appellant believes that review of this court's actions is necessary, his remedy lies in an application to the United States Supreme Court. Further attempts to obtain reconsideration by this court may result in the imposition of sanctions." (6 Record 413-414.)

Plaintiff-appellant's ability to seek review of the actions of Judges Hug and Wright was severely handicapped by their consistent refusal to address the circumstances of the case involved in

Plaintiff's appeals. This amounted to a flouting of the right of any litigant to a reasoned disposition of his case which is guaranteed by Virginian Railway Co. v. United States (1926) 272 U.S. 658, 675.

Count II also charges the following.

(3) The disingenuous opinions of Judges Hug and Wright, their stonewalling of Plaintiff's request for clarification, their intercepting of an appeal from their own actions, and their threat of sanctions if Plaintiff did not cease to try to have these actions reviewed by other judges in the Ninth Circuit all provide a stark contrast to the official policy of the Ninth Circuit toward litigants operating without a lawyer which is noted in United States v. Hough (1957) 157 F.Supp. 771, 774-775:

> "Where the petitioner appears in propria persona, as was observed by Judge Barnes of the Court of

Appeals of the 9th Circuit,

> 'the court itself undertakes to assure the litigant that no meritorious case be lost because of a lack of legal skill. Briefs are scanned with unjaundiced eyes and technical compliance with the Rules of the Court is not stringently enforced. The dominant theme is liberality.' Hoffman v. United States, 9 Cir., 244 F.2d 378, 379."

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judge Lawrence K. Karlton

Item # 21 (14 Record 2-3)

Filed April 4, 1985[21.01]

The motion of plaintiff to join the California Supreme Court as party defendant came on regularly for hearing on August 27, 1984. Plaintiff appeared pro se; defendant Eu appeared by her counsel, Richard B. Maness, Esq.; defendant in intervention Assembly appeared by its counsel, Joseph Remcho, Esq. and Barbara Brenner, Esq.; defendant in intervention Senate appeared by its counsel, Benjamin Scheibe, Esq. The California Supreme Court appeared specially by its counsel, Paul H. Dobson, Deputy Attorney General, for the purpose of contesting the motion to join the Court. The motion was argued and submitted to the court for adjudication.

Good cause appearing therefor, the court denies the motion to join the Supreme Court. No claim is or can be stated against the Supreme Court[21.02] with respect to the issues in this case.

[Footnote: To the degree the plaintiff seeks to amend or supplement his complaint,[21.03] the motion is also DENIED, as the amendments or supplementations add nothing to the claims already rejected by the court in previous motions.[21.04]]

IT IS SO ORDERED. [Footnote: The motions to dismiss the claims relative to the redistricting plan will be disposed of by the three-judge court in due course.]

/s/ Lawrence K. Karlton, Chief Judge
United States District Court

Dated: April 4, 1985

Plaintiff's Contextual Footnotes:

21.01 This order (except for the two footnotes added by Judge Karlton) was lodged with the Court by Defendant on August 31, 1984.

21.02 In its order of November 1, 1982 the District Court ruled that Plaintiff did not enjoy a substantial chance of succeeding on the merits because "the court notes that the challenged plan was adopted for this election only by the California Supreme Court, and that in doing so that court concluded that it was far and away the most satisfactory plan available in terms of compliance with the one person, one vote mandate. Assembly v. Deukmejian, 30 Cal.3d at 674. At least at this stage in the proceedings, we must give some deference to the finding of the California Supreme Court." (5 Record 481.) The issues raised in briefing on whether the California Supreme Court should be a defendant in Halliwell v. Eu are quoted at 18 Record 155-163.

21.03 Plaintiff brought on his motion for leave to amend his complaint because the order of March 27, 1984 invalidated his August 1983 supplemental complaint which noted that the 1983 redistricting plans were 90%-92% unchanged from their predecessors and perpetuated all the constitutional flaws challenged in Plaintiff's original complaint. The order of March 27, 1984 ruled:

"The court likewise declines to take cognizance of the plaintiff's motions that seek an adjudication of the districts created by the 1983 redistricting plan. The plaintiff's complaint does not raise any issue, factual or legal, regarding the 1983 redistricting plans. Absent considerations not applicable here, see F.R.Civ.P. 15 (b) and 16, the complaint defines the issues raised by the litigation. The plaintiff is free, of course to move for leave of court to file a supplemental complaint, F.R.Civ.P. 15(d), but he has not done so. The plaintiff is not free to seek an adjudication of disputes not fairly presented by the complaint." (12 Record 255.)

21.04 Plaintiff reviews (at 17 Record 128 -133) the evasive tactics used by the Court to prevent Plaintiff from challenging the constitutionality of the January 1983 redistricting plans without ever ruling on his right to do so:

"Prior orders of the Court had suggested that Plaintiff could readily have secured a ruling on his right to challenge these districts.

"What would have been the order of December 17, 1982 (Item # 15) had it been promptly filed states:

'If plaintiff desires to supplement his complaint, F.R. Civ.P. 15(d), he may, of course, file a motion for leave of court. Such a motion will

> be heard on the briefing schedule set by the Court's order after status conference [order of December 16, 1982], if properly noticed and briefed.' (7 Record 526.)

According to the order of December 16, 1982 (Item #13):

> '[Motions and briefs] shall be submitted according to the following schedule, and only according to that schedule: the motions shall be filed and served with supporting memoranda not later than January 7, 1983.' (6 Record 275-276.)

"But Plaintiff could not possibly have filed a motion on this schedule, since the schedule was filed on February 8, 1983. (See 7 Record 524.)

"When Plaintiff received the order of February 8, 1983 on February 11 it did not appear that the precedence given to the order of December 16, 1982 over the right to file motions under Local Rules (see 7 Record 526) would seriously delay a motion for leave to amend to challenge the 1983 districts. The order of December 16, 1982 required:

> 'All decisions regarding other matters in this case are now deferred pending disposition of the motions to be heard by the Court on February 16, 1983.' (6 Record 276.)

Plaintiff had no idea that disposition of motions heard by the Court on February 16, 1983 would be delayed so long that he would not have time to seek leave to amend well in advance of the 1984 elections.

"The order of January 28, 1983 (Item #14) promised that at the February 16, 1983 hearing, 'Parties may then request the Court to enter an order scheduling the filing of briefs and hearing of other appropriate motions.' (7 Record 358.) Emphasis added. But what seemed to be an ample opportunity to challenge the 1983 districts within the framework required by the Court began to dwindle when the Court did not return as expected after the following remarks at the February 16, 1983 hearing.

> 'JUDGE KARLTON: Thank you sir. The Court will stand in recess.
>
> 'MR. HALLIWELL: Your Honor, in your modification [Item #14] of order following status conference, there has been some reference that some arrangement --
>
> 'JUDGE KARLTON: We will issue an order.' (Hearing Transcript at 83.)

"Opportunity dwindled further when the order of April 19, 1983 (Item #16) continued the Court's protracted contemplation of motions argued on February 16, 1983 'sufficiently novel, subtle, and grave as to demand the most careful and thorough consideration by the Court' (8 Record 118) but did not include a provision for filing 'other appropriate motions,' as promised at the February 16, 1983 hearing.

"Plaintiff thought he had satisfied the necessary procedural preliminary to challenging the 1983

districts with his August 1983 supplemental pleading, but when he sought to expedite consideration of motions filed pursuant to this pleading the Court informed him on February 6, 1984 (Item #17) that its continued 'careful and thorough consideration' of motions argued at the February 16, 1983 hearing made it 'ill-advised to hold a status conference at this time.' (See 12 Record 47.)

"The order of March 27, 1984 (Item #18) temporarily ended this game of judicial 'hide and seek' when the Court suggested that Plaintiff had been free all along to file a motion for leave to amend and explicitly stated that the Court would consider such a motion: 'The Plaintiff is free, of course, to move for leave of court to file a supplemental complaint, F.R.Civ. P. 15(d), but he has not done so.' (8 Record 255.)

"However, the problem of docketing for expedited hearings (see [17 Record 122-127] above) blocked this prospect. The order of April 19, 1983 (Item #16) had explicitly affirmed that the scope of Plaintiff's complaint was a matter to be determined by the full Court (see 8 Record 120), so, given the imminence of the 1984 elections, an initial determination of a motion for leave to amend by a single judge had the effect of delaying action and thereby making any relief for a meritorious claim much more disruptive than it otherwise would have been. When a court clerk notified Plaintiff

that his April 7, 1984 motion for leave to amend must be placed on Judge Karlton's calendar and that the first open date was June 4, 1984, Plaintiff protested:

> 'Obviously it is a perversion of judicial procedure to delay until June 4, 1984 a decision on whether to adjudicate Plaintiff's challenge to the constitutionality of districts to be used in the June 5, 1984 elections. If this court is unwilling to consider Plaintiff's grievances regarding the 1984 districts it should so rule immediately, enabling Plaintiff to appeal immediately under 28 U.S.C. § 1292.' (12 Record 385.)

"The full Court waited until well after the June primary to rule on the scheduling of Plaintiff's motion for leave to amend (see order of June 25, 1984, at 13 Record 283-284). Then it managed yet more delay by requiring the motion to be heard on Judge Karlton's regular law and motion day.

"When Plaintiff finally was able to secure a hearing before Judge Karlton on August 27, 1984 Judge Karlton ruled that recent Supreme Court decisions such as Schmidt v. Oakland Unified School District (1982) 73 L.Ed.2d 245 and Karcher v. Daggett (1983) 103 S.Ct. 2653 did not support any of Plaintiff's previously excluded claims. However, Judge Karlton refused to rule on the central isue of the 1983 districts and took Plaintiff's

motion under advisement. (See 16 Record 451-454.)

"Judge Karlton kept Plaintiff's motion under advisement for seven months, until April 4, 1985. Then he included the following footnotes along with his cryptic denial of Plaintiff's motion for joinder of the California Supreme Court (Item #21):

> '1) To the degree the Plaintiff seeks to amend or supplement his complaint, the motion is also DENIED, as the amendments or supplementations add nothing to the claims already rejected by the Court in previous motions.
>
> '2) The motions to dismiss the claims relative to the redistricting plan will be disposed of by the three-judge court in due course.' (14 Record 3.)

"In spite of Plaintiff's repeated efforts to secure a ruling on his right to challenge the 1983 districts, the Court never ruled on the issue. It ruled in its order of July 9, 1985 (Item #22) that Plaintiff was not entitled to any remedy because '[The 1984] election, and the plan under which it was conducted, is not before the Court.' (15 Record 200.)"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judges Kennedy, Karlton and Ramirez

Item # 22 (15 Record 197-202)

Filed July 9, 1985

I. BACKGROUND

The plaintiff, Michael J. Halliwell, filed his First Amended Complaint for claims arising under 42 U.S.C. § 1983, challenging the constitutionality of the 1982 court-ordered apportionment plans under which California voters were scheduled to elect representatives to the State Assembly and Senate, and to the United States House of Representatives. The facts leading up to the lawsuit are summarized in the court's order of July 1, 1982, granting the Senate's motion to dismiss, and granting plaintiff leave to amend as to his Article I, § 2 ("One-Person, One-Vote") claims.

The Second Amended complaint challenged the constitutionality of the Senate, Assembly, and Congressional districts for use in the 1982 elections, on the basis that they violated the "One-Person, One-Vote" principle embodied in

the U.S. CONST., art. I, § 2, and the Equal Protection Clause of the 14th Amendment.[22.01] In due course, the Senate moved to dismiss the complaint, and the Assembly moved for summary judgment. The court granted both motions. (Order of March 27, 1984.)[22.02]

The only remaining matter before the court is the plaintiff's challenge to the allocation of population among the Congressional districts used in the 1982 elections. On its own motion, the court invited defendant March Fong EU, California Secretary of State, to move to dismiss this remaining claim. Defendant Eu's motion argued that plaintiff's remaining claim was moot, since the 1982 elections have passed.

For the reasons which appear below, the court finds that plaintiff's remaining claim is moot. The action is therefore DISMISSED in its entirety without

leave to amend.

II. MOOTNESS

This court is empowered only to resolve actual cases or controversies. U. S. CONST. art. III; Iron Arrow Honor Society v. Heckler, 464 U.S. 67, 104 S. Ct. 373, 374 (1983) (per curiam) (citing DeFunis v. Odegaard, 416 U.S. 312, 316 (1974)); NAACP, Western Region v. City of Richmond, 743 F.2d 1346, 1352 (9th Cir. 1984). If the relief sought has become impossible to grant due to the passage of time, or a change of circumstances, then even if the plaintiff has suffered an injury at the hands of the defendants, the injury can no longer "be redressed by a favorable judicial decision." Iron Arrow, 104 S.Ct. at 374-75 (citing Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976)); NAACP, 743 F.2d at 1353. In such a situation, the case is "moot," and

must be dismissed for lack of constitutional authority to proceed.[22.03] Iron Arrow, 103 S.Ct. at 374 (citing DeFunis, 416 U.S. at 316).

Plaintiff in this case seeks to invalidate the court-ordered apportionment plan used in the 1982 Congressional elections. Since the 1982 elections have passed, and a new apportionment plan has been in effect since the 1984 elections, it would appear that no relief can be granted to the plaintiff which would redress his alleged injuries. Plaintiff suggests two possible remedies which he asserts would redress his alleged injuries.[22.04]

A. Term Shortening

The plaintiff suggests that the court could invalidate the 1982 election, and shorten the terms of Members of the United States House of Representatives who were elected under the challenged

plan. This remedy is not available. Terms of Members of the House are two years in duration, and therefore have already expired; there is nothing left to "shorten."

B. Incumbent Designation

According to the plaintiff, incumbents running in subsequent elections are designated as such on the ballot. Plaintiff seeks to remove this designation from Members elected in the challenged election, seeking reelection. This remedy is also not available, since the 1984 elections have already been held.[22.05] At this point, the incumbent designation (assuming that it exists), applies to persons elected during the 1984 election. That election, and the plan under which it was conducted, is not before the court.[22.06]

III. EXCEPTIONS TO THE MOOTNESS DOCTRINE

Certain controversies are of such short duration, that strict application of the mootness doctrine would prevent them ever from being brought to court for resolution, notwithstanding the injuries they cause. See, e.g., Roe v. Wade, 410 U.S. 113, 125 (1973) (controversies involving pregnancy). Such controversies are capable of repetition, yet they evade judicial review by virtue of their short duration.[22.07] See Storer v. Brown, 415 U.S. 724, 737 n.8 (1974) (quoting Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973)); NAACP, 743 F.2d at 1353 (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546 (1976)).[22.08] Controversies involving elections are often within this category. See, e.g., Anderson v. Celebrezze, 460 U.S. 780, 784 n. 3 (1983).[22.09] Plaintiff asserts in his Opposition to defen-

dant EU's motion to dismiss, that this case is "capable of repetition, yet evading review." Application of this exception requires that there be a reasonable likelihood that the same party will be subject to the challenged action again. NAACP, 743 F.2d at 1353.

A. Future Applications of Challenged Plan

In this case, the exception would apply if the challenged plan were still in force, but the election had already taken place. In such a case, the issues presented would "persist as the [plan is] applied in future elections." Storer, 415 U.S. at 737 n. 8. As noted above, the matter at bar is not such a case since the plan is no longer in operation.[22.10]

B. Voluntary Abandonment of Challenged Plan

The exception (or a related one)

might also apply if the defendant had ceased its allegedly unconstitutional conduct in order to achieve a dismissal, but planned to renew its conduct after dismissal. See, e.g., City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982). That is not the case here. All parties appear to concede that the 1982 plan is no longer in operation because it was defeated in a referendum election by the voters of California. Nor is the Supreme Court plan in operation, the legislature having adopted a new plan. This is, therefore, not a case of the defendant voluntarily ceasing its conduct as the result of the lawsuit; it was the action of other persons, not party to the litigation, which mandated the cessation of the challenged conduct. See Iron Arrow, 104 S.Ct. at 375-76 (concerning voluntary acts of third-parties as sufficient to cause a case to become

moot).[22.11]

IV. CONCLUSION

For the reasons set out above, the court determines that the remaining claim, based upon the "One-Person, One-Vote" principle embodied in Article I, § 2 of the Constitution, and the 14th Amendment of the Constitution, is MOOT to the degree it complains of the 1982 Congressional apportionment or redistricting plan.

All of the other claims having been dismissed by order of March 27, 1984,[22.12] this action is DISMISSED in its entirety, without leave to amend.

IT IS SO ORDERED.[22.13]

/s/ Anthony M. Kennedy, Judge
United States Court of Appeals

/s/ Lawrence K. Karlton, Chief Judge
United States District Court

/s/ Raul A. Ramirez, Judge
United States District Court

Dated: July 9, 1985

Plaintiff's Contextual Footnotes:

22.01 Plaintiff's motion for reconsideration states at 15 Record 254: "However, the order misstates the circumstances that led up to the narrowing of Plaintiff's complaint to the above grievances. The order of July 9, 1985 refers at 2:5-6 to 'the Court's order of July 1, 1982 granting the Senate's motion to dismiss,' but in fact Judge Karlton ruled in this order:

> 'The motions to dismiss the complaint for failure to state a claim upon which relief may be granted, and for lack of subject matter jurisdiction are denied. The plaintiff's amended complaint is dismissed, however, so that he may draft new pleadings consistent with this order . . . .' Id. at 16:5-9. Emphasis added.'

Plaintiff quotes the grounds for dismissal presented by Defendants at 15 Record 290-291:

"The motions brought by the Senate and Assembly challenged Plaintiff's complaint on the following grounds:

1) 'a three-judge district court cannot be properly convened pursuant to provisions of 28 U.S.C. § 2284 when Plaintiff's challenge for all intent and purposes is not of a reapportionment statute of a statewide legislative body, but of the California Supreme Court's temporary redistricting of the California Legislature for the 1982 primary and general

elections.' 3 Record 13.

2) 'This Court lacks subject matter jurisdiction . . . [since] Plaintiff has failed to allege the jurisdiction of the Court. Plaintiff does not allege that the jurisdiction of this Court is based on 28 U.S.C. § 1343 and 42 U.S.C. § 1983.' 3 Record 16.
3) 'Plaintiff fails to state a claim upon which relief may be granted [since] Plaintiff has failed to allege that the conduct of Defendant was done under color of state law or that it constitutes state action.' 3 Record 16.
4) 'Plaintiff's challenge of the legislative redistricting statutes is not ripe inasmuch as the statutes are not in effect.' 3 Record 16.
5) 'Plaintiff's Due Process argument cannot stand. Plaintiff HALLIWELL in his original complaint on page 3 paragraph 4, alleges denial of due process. In a motion to dismiss, averments of a complaint are taken to be true. Plaintiff in said paragraphs alleges that he has not received adverse rulings and that his petitions have not been rejected on procedural grounds. As such, there can be no denial or violation of due process and Plaintiff's allegations here must be dismissed.' 3 Record 17.
6) 'Plaintiff HALLIWELL's challenge is substantially without merit and foreclosed by the [Upham & Clifford v. Seamon] decision of the United States Supreme Court

in that without a finding that the 1981 legislative statutes were unconstitutional the California Supreme Court was not free to disregard and must defer to the California legislative judgments in the California 1981 legislative statutes.' 3 Record 19.

7) 'California's redistricting has been found by the United States Supreme Court to have been validly performed on adequate and independent grounds as to Congressional redistricting, and there is no reason why any other finding is applicable to California's Senatorial redistricting, as a matter of law.' [3 Record 20.]

8) 'In Senate of the State of California, et al. v. William French Smith, No. 81-2767 the United States District Court for the District of Columbia has held that the new California State Senatorial Districts are in compliance with the Voting Rights Act of 1965, as amended, 42 U.S. C. § 1973: "Plaintiffs are entitled as a matter of law to a declaratory judgment that California's New Plan 'does not have the purpose and will nor have the effect of denying or abridging the right to vote on account of race, color, or membership in language minority group with respect to Kings, Merced, Monterey and Yuba Counties, California.'"' 3 Record 20-21, 38.

9) 'As a matter of Comity, Absten-

tion, Equity and Federalism, this Court should refuse to review Plaintiff's complaint.' 3 Record 21.

10) 'Mr. Halliwell has shown only that he shares with the general public an interest in seeing that California legislative elections are conducted constitutionally. Such citizen standing, based on a general grievance common to all or a large class of people or based on a concern for constitutional governance, has been rejected by the Supreme Court as inadequate under Article III.' 3 Record 237.

11) 'Although the California Supreme Court has not yet passed on the constitutionality of the plans as permanent districting statutes, one can hardly doubt that the matter will again be quickly put before it if the plans are approved by the electorate. If nothing else, Assembly v. Deukmejian clearly demonstrates the sensitivity of that court to the federal constitutional issues. This Court should therefore stay its hand in any event to give the California Supreme Court an opportunity to decide whether the districts meet state and federal constitutional requireemtns.' 3 Record 240.

12) 'Plaintiff seeks an injunction forbidding the use of the redistricting plan on a permanent basis. This very question is on the June 8, 1982 ballot. In the event the electorate rejects the

statutory reapportionment plan, there will be no need for action by this court. This issue will be moot.' 3 Record 247.

13) 'Plaintiff also raises Guaranty Clause (Article IV § 4) claims . . . Guaranty Clause claims are clearly not justiciable, Baker v. Carr, 369 U.S. 186, 218-26 (1962).' 3 Record 247.

14) 'The claims of dilution of minority voting strength do indeed raise justiciable claims under the Voting Rights Act, 42 U.S.C. § 1971, et seq.; but the United States District Court for the District of Columbia has exclusive jurisdiction over the merits of those claims.' 3 Record 247-248."

Plaintiff quotes the reasons for the Court's rejecting these challenges at 15 Record 291-293:

"The order of July 1, 1982 denied Defendants' motions on the following grounds:

1) 'The Defendants contend that Mr. Halliwell, who sues merely as a taxpayer, a citizen, and a California voter, lacks standing to bring an action based on these claims. . . . There can be no doubt that the doctrine of standing to sue has shrunk appreciably in the years since the Supreme Court announced that voters have standing to challenge the constitutionality of state legislative apportionment schemes in federal court in Baker v. Carr, supra. Given these doctrinal changes, Justice Powell's

suggestion that "Baker v. Carr may have a special claim to sui generis status" (United States v. Richardson, 418 U.S. at 195 n. 17 (Powell, J., concurring) rings all too true. The fact remains, however, that no matter how anomalous Baker v. Carr may seem, in light of recent cases, it is still the law on this point. No subsequent case has overruled the Baker v. Carr holding; to the contrary, the Supreme Court has regularly entertained apportionment challenges brought by citizens through the twenty years since that case was decided. [Citations.] The challenge to plaintiff's standing to sue is without merit.' 4 Record 52-53.

2) 'Defendants in intervention Senate, et al., argue that the three-judge requirement of Section 2284 does not apply unless the action in question challenges an apportionment statute. Because the instant case consists only of a challenge to court-ordered apportionment plans, these defendants claim that section 2284 may not properly be invoked. Aside from informing the Court that this is their position on the matter and that they are currently litigating the question in another, perhaps related lawsuit in the Northern District of California, the defendants have given the Court very little argument or authority to support that position. Some dicta from

a federal district court opinion and a thoroughly inconclusive scrap of legislative history do not provide a basis for me to conclude that section 2284 does not mean exactly what it says: that when state apportionment plans are challenged in a federal lawsuit, a three-judge court must be convened.' 4 Record 56-57.

3) 'Little need be said regarding the defendants' contention that "as a matter of comity, abstention, equity and federalism, this court should refuse to review plaintiff's complaint." As the Supreme Court has commented about the leading abstention doctrine, "this principle does not, of course, involve the abdication of federal jurisdiction but only the postponement of its exercise." - Harrison v. NAACP, 360 U.S. 167, 177 (1959). In the case at bar, there are no pending or anticipated state proceedings that will dispose of the matters in issue, save and except the November election which may render those issues moot. Quite simply, there is no proper basis for abstention in this case. As for comity and federalism, those doctrines neither require nor permit this court to reject out of hand a constitutional challenge to reapportionment plans devised by a state, whether those plans were adopted by the state legislature or by a final decision of

the state's highest judicial body. Lastly, notions of equity may indeed be dispositive in this case. See Reynolds v. Sims, 377 U.S. 533, 585 (1964). Such equitable considerations, however, will be entertained if and when the Court considers what remedies, if any, may be afforded to the plaintiff. These considerations do not bear on the question of whether the plaintiff has properly invoked the jurisdiction of this court, or whether he has stated a claim upon which relief can be granted.' 4 Record 53-54.

4) 'The defendants' remaining challenges to the complaint are even less substantial. They assert, in essence, that the plaintiff has not pleaded the elements of a section 1983 claim with sufficient specificity, and that the plaintiff's claims lack merit. Both sets of objections miss the point of the motion to dismiss procedure in this notice-pleading system. I reiterate that the question is not whether the complainant has pled his claim with specificity; on the contrary, the suit may not be dismissed without leave to amend "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); accord, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Similarly, "[t]he issue

> is not whether a plaintiff's success on the merits is likely but rather whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims." DeLaCruz v. Tomey, 582 F.2d 45, 48 (9th Cir. 1978), cert. denied, 441 U.S. 965 (1979).' 4 Record 54."

Plaintiff's motion for reconsideration continues at 15 Record 255: "Judge Karlton explains his treatment of Plaintiff's complaint:

> 'The California Assembly (and certain named members of that body) and the California Senate have intervened as defendants to this action and have brought on the motions to dismiss mentioned above. Defendant March Fong Eu essentially has joined in these motions. As I shall explain, these motions do not fatally pierce the plaintiff's lawsuit. They are, however, a useful tool with which to hack away the necrotic claims and attached allegations, arguments, innuendo, and creative legal theories which form the bulk of this massive, sprawling complaint. In this manner I hope to reveal whether there is any living tissue consisting of cognizable constitutional claims buried within this great flaccid carcass.' Id. at 4:10-21.

The fact that Judge Karlton acted sua sponte and without notice to Plaintiff in performing major surgery on his complaint is especially significant because the full Court

has refused to rule on Plaintiff's noticed and briefed motion challenging this action on due process grounds (see 7 Record 59-67) or on any of the five motions also noticed and briefed challenging each of Judge Karlton's dismissals without leave to amend (see 7 Record 68-86, 87-98, 99-105, 106-109 and 110-112)."

22.02 Plaintiff's motion for reconsideration states at 15 Record 256-262: "Plaintiff filed a noticed motion for reconsideration of the termination of his assembly and senate claims by the order of March 27, 1984. The Court appeared to recognize that it thereby retained jurisdiction over these aspects of the case when it provided for a briefing schedule for this motion in its order of June 25, 1984 (13 Record 282-285). Moreover, on July 3, 1984 this court exercised its continuing jurisdiction over Plaintiff's senate claims when it established a briefing schedule for a motion 'whereby the Plaintiff moves the Court for injunctive relief requiring special remedial elections in certain senatorial districts.' (13 Record 333.)

"The Senate responded (13 Record 413-420) according to the briefing schedule established by the order of July 3, 1984, but it declined to address the merits of Plaintiff's proposals in either practical or legal terms because according to the Senate this court lacked jurisdiction to consider Plaintiff's motion. However, U.S.

Supreme Court Rule 44.4 provides:

> 'An application for a stay or injunction to a Justice of this Court shall not be entertained, except in the most extraordinary circumstances, unless application for the relief sought first has been made to the appropriate court or courts below, or to a judge or judges thereof. Any application must identify the judgment sought to be revised and have appended thereto a copy of the order and opinion, if any, and a copy of the order, if any, of the court or judge below denying the relief sought, and must set forth with specificity the reasons why the granting of a stay or injunction is deemed justified.' Emphasis added.

Since the Senate did not seek to invoke the 'most extraordinary circumstances' exception as a basis for assertion of jurisdiction by the Supreme Court, this court clearly had jurisdiction to consider injunctive relief requiring special remedial elections in certain senatorial districts. Ninth Circuit policy naturally supports Supreme Court Rules on this point, as 'jurisdiction cannot just float in the air.' See Ruby v. Secretary of U. S. Navy (1966) 365 F.2d 385, 388-389.

"In spite of the Senate's muddying the procedural waters by refusing to provide this court with any grounds for denying a motion for which the Court appears (from

its continuing delay in ruling on the motion) to have no enthusiasm, there are still feasible remedies for the continuing effects of senate district misnumbering. Should any of the senators given an allegedly unconstitutional advantage by this device die or retire before their terms expire in December 1986, special elections to fill the unexpired portion of the term could and should be held in revised districts. If no vacancies occur and district revisions are deemed unduly disruptive, any of these senators seeking re-election in 1986 could and should be deprived of their ballot listing as state senators to keep them from perpetuating this unfair advantage gained from misnumbering in 1982. The ground asserted as a basis for mootness of Plaintiff's congressional claims by the order of July 9, 1985 at 4:2-4, 'Terms of members of the House are two years in duration, and therefore have already expired,' clearly does not apply to Plaintiff's senate claim.

"In view of the history of this court's denial by protracted delay of all of Plaintiff's prior injunctive proposals involving senate districts, submission of yet another proposed senate district remedy seems unlikely to be the most effective course of action in the present circumstances. The best vehicle to elicit a ruling on senate districts appears to be Plaintiff's long-pending motion for a declaratory judgment on this subject.

"The order of March 27, 1984

states at 21:23-22:8:

> 'On December 6, 1983, the Plaintiff filed a motion for declaratory judgment . . . on the constitutionality of the districts used in California's 1982 congressional and state legislative elections. . . . This order obviously moots the Plaintiff's motions with respect to State Senate and Assembly districts.'

It is obvious that a 'finding that the districts used for the assembly elections were, in fact, constitutional' (order at 22:10) does constitute a declaratory judgment on the contested assembly districts even though it was made without the necessary facts because the Assembly has withheld them; but how does a finding that 'even if [Plaintiff] were to . . . convince us of the correctness of his vote acceleration and deferral theory, the Court would in the exercise of its equitable power deny him the [injunctive] relief he seeks' (order at 12:19-23) impair a motion for declaratory judgment regarding the senate districts?

"While the order of March 27, 1984 does render a judgment on the merits of Plaintiff's assembly claim, this judgment is really a default judgment, not an evaluation of the evidence relating to the actual size of assembly district population disparities. The order of March 27 states at 15:9-19 (12 Record 248):

> 'The Plaintiff vigorously

> disputes the figures proffered by the Assembly, but not in any legally cognizable way. The United States Court of Appeals for the Ninth Circuit has repeatedly held that a party opposing another's motion for summary judgment must counter the moving party's affidavits or declarations with affidavits or declarations of his own, and failure to do so will result in the granting of the motion. [Citations.]'

"However, Plaintiff cured the evidentiary defect noted above more than one year ago with the declaration of June 6, 1984 (13 Record 179-200) and by calling the Court's attention to relevant materials [Footnote: Under the terms of Local Rules effective October 1, 1984 (Local Rule 260a), 'Any party opposing a motion for summary judgment shall file a concise statement, and the source thereof in the record, of all material facts as to which there is a genuine issue precluding summary judgment.' However, under the Local Rules in force at the time this court considered and then granted the Assembly's motion for summary judgment, no such obligation existed and Plaintiff had no way of knowing (since the Court held no hearing on the Assembly's motion for summary judgment) that the Court had overlooked crucial declarations filed for verification purposes.] in the exhibits (see 1 Record 274) filed at the outset of the proceedings 'for verification purposes

only.' Plaintiff certainly expected the Court to hold a hearing on the Assembly's motion for summary judgment and had not seriously considered the possibility that this court would rule in favor of the Assembly without even a hearing, considering the fragmentary evidence submitted to support the Assembly's motion. [Footnote: The Assembly submitted no census data of any kind supporting its alleged populations and provided no subtotals which might have allowed verification of its figures. All that was provided was an affidavit claiming (at 8 Record 18: 'Exhibit A [consisting only of a bare listing of district populations] hereto contains all of the information concerning the actual population of Assembly districts used in California's 1982 general election.' The affidavit supporting Exhibit A (8 Record 21-25) goes into detail about affiant's background but says nothing whatever about how populations were calculated. The only reference to population calculation provided anywhere by the Assembly is in paragraph (e) of the declaration of Bruce Cain, 'Special consultant to the Assembly Committee on Elections and Reapportionment.' (8 Record 39.) This statement notes: 'In certain cases, it appeared necessary to split an enumeration district in order to ensure population equality among Assembly districts. Such splits are inherently somewhat imprecise, because one cannot be sure of the population in each half after the split. Once

the plan was complete, we reunited split enumeration districts where it was possible to do so without upsetting the balance of population equality.']

"Moreover, it was impossible for Plaintiff to file an appropriate counter motion under the terms of this court's orders. The Court decided on the provisions of the order of February 8, 1983 on December 17, 1982 but filed this order too late for Plaintiff to file motions according to its deadlines. [Footnote: Judge Karlton ruled in his December 16, 1982 order following the December 6 status conference: 'All [motions] shall be submitted according to the following schedule, and only according to that schedule: the motions shall be filed and served with supporting memoranda not later than January 7, 1983.' The order of February 8, 1983 provides: 'At the status conference conducted by the Honorable Lawrence K. Karlton on December 6, 1982, a schedule for the hearing of all motions was discussed and ordered. This schedule prevails over Local Rule 113.'] Because the order was filed too late to be followed, Plaintiff understood its terms (at 7 Record 526) invoking the provisions of the order of December 16, 1982 (at 6 Record 275-276) as precluding his filing a Rule 56(f) motion (or any motion) in response to the Assembly's refusal to provide population source data necessary to prepare affidavits to counter the Assembly's population figures. Plaintiff understood this from the

following exchange with Judge Karlton at the December 6, 1982 hearing, which seemed to strictly limit the motions the Court would consider until it had disposed of motions challenging the Court's jurisdiction:

> 'MR. HALLIWELL: What I have tried to do, and I'm going to continue to try to do, is get an adjudication [of] underlying constitutional issues before I try to make specific motions for remedial action. I'm entitled to declaratory judgment under [§] 2284, am I not?
>
> 'THE COURT: You are entitled to a declaratory judgment if you otherwise are entitled to be here. But that is entirely a different question than the question of whether or not you are properly here.' Hearing Transcript at 19-20.

Plaintiff might have been able to straighten out this very ambiguous situation and thus avoid a procedural trap by the Assembly if Plaintiff had been allowed to communicate with Judge Karlton's staff on the same terms as Defendants' counsel could. But he was (and still is) enjoined from any such communication, and thus he assumed he was prevented from responding to the Assembly's crucial assertions -- until after this court had granted the Assembly's motion.

"The details of this procedural trap by the Assembly are set forth in Plaintiff's June 4, 1985 'Brief

Concerning Cases Cited by the Assembly at the May 23, 1985 Hearing' and the section of Plaintiff's memorandum of points and authorities of June 22, 1985 entitled, 'The order of March 27, 1984 Cannot Justify Refusal by the Assembly to Respond to Plaintiff's Inquiries Inasmuch as the Assembly Secured Its Summary Judgment by Fraud and Misrepresentation.' In brief: (1) Plaintiff received the Assembly's summary judgment motion on February 18, 1983 and the Court then set a schedule providing for a response by Plaintiff and rebuttal by the Assembly; (2) the Assembly made a number of misleading statements and outright misrepresentations in its rebuttal, so Plaintiff was unable to answer them without filing the same sort of 'out-of-season' arguments for which Judge Karlton had severely criticized him in footnote 10 of the order of July 1, 1982 (at 4 Record 62-63); (3) when Plaintiff criticized the Assembly's tactics and refuted its misrepresentations in his memoranda (12 Record 305-383 and 13 Record 142-200) supporting his motion for reconsideration of the order of March 27, 1984 the Assembly's only response was, 'Mr. Halliwell's continued attacks on counsel, like his previous attacks on this Court, are false. They do not deserve any further response.' (13 Record 431.)

"In view of the nature of this court's prior treatment of Plaintiff's senate and assembly claims, some ruling on his motion for reconsideration of the dismissal of

these claims by the order of March 27, 1984 is vitally important to preservation of Plaintiff's right to meaningful appellate review of this court's actions."

22.03 Plaintiff's motion for reconsideration states at 15 Record 263-266:

"In his May 11, 1984 opposition to dismissal at 12:10-15:11 (13 Record 18-21) Plaintiff describes the sequence of events which led to the allegedly moot condition of his congressional claim.

'[A]t no point in this litigation, including Defendant's motion of April 20, 1984, has any factual or legal rebuttal been attempted to any of Plaintiff's challenges to the constitutionality of the contested congressional districts. In its order of November 1, 1982 this court notes:

"No party has intervened as a defendant in this action specifically to represent the interests of California's congressional delegation; thus the only information now before the court regarding disparities in the congressional apportionment plan is that contained within plaintiff's complaint and moving papers. [From this] the court calculates that the maximum percentage deviation in these districts is 1.32%." 5 Record 480.

'The order of November 1 acknowledges the "precise mathematical equality" standard for congressional district populations set forth in Kirkpatrick v. Preisler(1969) 394 U.S. 526 but [mistakes a reference to state legislative districts for one to the congressional plan and observes]:

> "[T]he court notes that the challenged plan was adopted for this election only by the California Supreme Court, and that in doing so that court concluded that it was far and away the most satisfactory plan available in terms of compliance with the one person, one vote mandate. Assembly v. Deukmejian, 30 Cal.3d at 674. At least at this stage in the proceedings, we must give some deference to the finding of the California Supreme Court. Thus we cannot say that the plaintiff now enjoys a substantial chance of succeeding on the merits of his challenge to the congressional plan." 5 Record 481.

'In fact Assembly v. Deukmejian contains no mention anywhere of the populations of the congressional districts ordered into effect on the court's own authority.

. . . . .

> 'Rather than requiring a responsive pleading to Plaintiff's congressional grievances . . . this court's next move was to propose dismissal of Plaintiff's congressional claims "unless Mr. Halliwell serves as defendants each of California's congressional representatives." 7 Record 11. Though the Court thanked opposition counsel for his "splendid exegesis" in behalf of the Court's maneuver, the fact that counsel could find no precedent for dismissal for failure to join as parties all incumbent officeholders affected by a redistricting plan obliged the Court to abandon this rationale for not considering Plaintiff's congressional claims. See order of April 19, 1983 at 8 Record 125.
>
> 'Since the order of April 19, 1983 recognized the Secretary of State as the proper defendant to represent the interests of the state (8 Record 124), a court not determined to destroy by protracted delay Plaintiff's right to a final determination on the merits by the U.S. Supreme Court would have at long last required Defendant to provide a responsive pleading in proceedings that had been initiated 14 months earlier.'

"During the more than two years since the order of April 19, 1983 the Court never required anyone to file a responsive pleading to Plain-

tiff's congressional claims, never required Defendant to respond to Plaintiff's congressional discovery requests, never held a hearing on Plaintiff's allegations of clearcut violations of Karcher v. Daggett supra by the contested congressional districts, and never even followed through on the Court's commitment (in the order of March 27, 1984) to require briefing on Plaintiff's proposal for congressional injunctive relief even though Plaintiff supplied all the supplemental documentation of his congressional claims suggested by the order. What this court has done is wait until it judged that the claim set forth in Plaintiff's complaint was moot, refused Plaintiff leave to update his complaint, and dismissed the action. Such a style of adjudication would be an abuse of discretion in any case. But it is considerably more than this in a case for which Congress has mandated expedited consideration and required the hearing to be held 'at the earliest practicable day' (28 U.S.C. § 2284(b)(2)), a case involving rights of millions of Californians which the Supreme Court in Wesberry v. Sanders (1964) 376 U.S. 1, 17 calls the most precious of all rights in a free country which if undermined may cause other rights, even the most basic, to become illusory."

22.04 Plaintiff's motion for reconsideration states at 15 Record 232-233: "This passage, and the entire order, ignores the most fundamental aspect

of any determination of mootness, whether the challenged activities have in fact ceased. The fact that the new districts perpetuate and indeed aggravate the flaws of the plan originally challenged by Plaintiff is stressed in his May 11, 1984 opposition to dismissal at 16:20-17:26 (13 Record 22-23):

> 'Plaintiff has documented at 10 Record 187-189, 10 Record 332-355, and 10 Record 171-176 the facts showing that the new congressional districts are essentially unchanged from those used in 1982 and that the minor changes which have been made have increased the population disparities among congressional districts [approximately doubling the maximum disparity from 7,000 to 14,000]. Wright & Miller [in Federal Practice and Procedure § 3533] note:
>
> > "Passage of new legislation that does not satisfy the principles urged in attacking old legislation similarly does not moot the attack . . . . Any other conclusion would have created a superb method for resistant legislatures to avoid Supreme Court review." Id. at 278-279 . . . .
>
> 'In American Party of Texas v. White (1974) 415 U.S. 767, the opinion notes:
>
> > "Since it was a temporary measure, this primary financing legislation

> has expired and it has been replaced by new legislation . . . . The new legislation is also comparable to its predecessor [so the] . . . recent amendments to the 1972 . . . law have not mooted this controversy. . . . [I]n view of the special nature of election challenges in general and this short-term . . . measure in particular, we proceed to evaluate appellants' claims on the merits." Id. at 791 n. 23.'"

22.05 Plaintiff's motion for reconsideration states at 15 Record 241-243: "While some incumbents list themselves as 'Congressman,' 'Member of Congress,' 'United States Representative,' or some other occupational title which means the same thing as incumbent, the political advantage is the same. Plaintiff sought to deprive incumbents of the six flagrantly unconstitutional, specially tailored congressional districts (see 13 Record 15-16) of their incumbent's ballot designation at the next election, which was the 1984 election at the time the proposal was briefed. As Plaintiff documents at 8 Record 514-522, all six of these incumbents retain safe seats in the new plan, and they indisputably retain the status of incumbents which they won in 1982. The advantage of being listed as such on the 1984 ballot helped to preserve the

designation and will do so again in the 1986 election, so the effects of the unconstitutional elections continue.

"In Firefighters Local Union No. 1784 v. Stotts (1984) 104 S.Ct. 2576, (a case cited by Plaintiff at 13 Record 475-476 in support of his August 3, 1984 rebuttal in behalf of his motion to reconsider the order of March 27, 1984,) Justice O'Connor notes: 'When collateral effects of a dispute remain and continue to affect the relationship of litigants, the case is not moot.' Id. at 2591. Moreover, the residual effect in Stotts, a few months' advantage in seniority gained before the laid-off white firemen were rehired, is similar in its continuing impact to the advantage of incumbency in politics.

"Plaintiff happens to be represented by Congressman Mel Levine, one of the six new Democratic Representatives elected from specially tailored malapportioned districts in 1982, so the following ruling of the Stotts court is also appropos: 'As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute. Powell v. McCormack, 395 U.S. 486, 496-498 (1969).'

"Regardless of the fate of Plaintiff's proposal to strip certain congressional incumbents of this ballot designation, there remains the matter of declaratory relief. The order of March 27, 1984 states at 21:23-22:3:

'On December 6, 1983, the

> Plaintiff filed a motion for declaratory judgment (by which the Court understands the Plaintiff to mean summary judgment) on the constitutionality of the districts used in California's 1982 congressional and state legislative elections. . . . '

Even though Defendant's refusal to respond to this motion has greatly delayed its adjudication it is not moot even at this late date because a decision on it will have tangible impact on the congressional situation as it exists today.

"This is so because a declaratory judgment that the 1982 districts were unconstitutional will affect any ruling on the constitutionality of the successor districts. The U.S. Supreme Court ruled in Karcher v. Daggett infra that modest population disparities may be justified in order to 'preserve the cores of prior districts'; but this is so only if the prior districts were constitutional.

"Plaintiff has called this continuing effect of the 1982 districts to the attention of the Court [at 13 Record 120-122], but the Court has simply ignored it in the order of July 9."

22.06 Plaintiff's motion for reconsideration states at 15 Record 236-240: "THIS COURT'S INVOCATION OF PRESUMPTIVE VALIDITY AS GROUND FOR REFUSING TO CONSIDER WHETHER THE 1983 DISTRICTS PERPETUATE PLAINTIFF'S GRIEVANCES IS UNTENABLE BECAUSE THE LEGISLATURE WHICH DREW

THESE DISTRICTS WAS ELECTED FROM DISTRICTS NOT 'STRUCTURED SO AS TO REPRESENT FAIRLY ALL THE PEOPLE.'

"The only excuse this court has offered in these proceedings for refusing to adjudicate Plaintiff's well-documented contention that the 1984 districts perpetuate the defects challenged in his original complaint appears in the order of March 27, 1984 at 11:1-3 (12 Record 244): 'The 1984 apportionment plan is not before us and we must presume it to be constitutional.' But a court may never presume the constitutionality of a successor statute as a basis for finding mootness, for the burden of proof for demonstrating that the challenged activity has ceased and is not likely to be repeated always rests on the defendant. As Plaintiff notes at 16:10-18 of his May 11, 1984 opposition to dismissal (13 Record 22):

> 'In Federal Practice and Procedures § 3533 Wright and Miller note:
>
> > "In order to establish mootness, the court wrote [in United States v. W.T. Grant Company (1953) 345 U.S. 629] the defendant who has discontinued challenged activities must carry a heavy burden of demonstrating that there is no reasonable expectation that the wrong will be repeated." Id. at 266-267.'

Moreover, as Plaintiff points out in response to the order of March

27, 1984 (at 12 Record 376-377):

> '[T]he Kramer [v. Union Free School District (1969) 395 U. S. 621] opinion notes:
>
> > "The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality." 395 U.S. at 628.'

"Thus presumptive validity is not applicable to reapportionment lawsuits, and certainly not to one like Halliwell v. Eu, wherein (1) the legislature elected from the districts rejected in the June 1982 referenda (2) rushed through under a suspension of the rules (3) at an illegal special session called by the lame-duck governor (4) redistricting plans the only changes in which served to strengthen incumbents and (5) blocked any renewal of a referendum challenge to their self-serving districts with a specious urgency clause which declared that the public health, welfare or safety depended upon enacting districts immediately, more than a whole year before the opening of

filing for the next election.

"The order of July 9, 1985 attempts to get around Kramer (without actually mentioning this opinion) at 4:12-13: '[The 1984] election, and the plan under which it was conducted, is not before the Court.' But any redistricting plan, be it enacted in 1982, 1983 or any other time, certainly involves the structure of government, so it is an inescapable inference that a challenge to the 1982 districts as not fairly representing all the people must also apply to subsequent districts with the same defects. Therefore the Court is evading a crucial issue by refusing to look at the 1983 districts by denying Plaintiff leave to amend his complaint to challenge the 1983 districts. Thus this denial is clearly contrary to Rule 15(a) Fed.R. Civ.Proc., which provides that such leave 'shall be freely given when justice so requires.'

"The Court has justified this refusal by quibbling over the status of a 222-page document which Plaintiff filed on March 11, 1982 to facilitate early intervention by parties to Assembly v. Deukmejian and thereby promote the swift adjudication required by 28 U.S.C. § 2284(b)(2). Plaintiff mistakenly labelled this document an 'amended and inclusive opening complaint' rather than a 'memorandum of points and authorities,' but its true nature is clear from its proof of service (at 1 Record 272-273):

> 'All of the exhibits on the appended list are now for

> verification purposes only inasmuch as all substantive arguments previously incorporated by reference have been included in the text of the amended and inclusive opening complaint. Accordingly I have sent via first class mail only this inclusive brief to the following attorneys for parties to court actions which are related to CIV.S. 82-147-LKK. [Names and addresses of attorneys.]'

How the 222-page 'inclusive brief' relates to the status of the 1983 districts is related by Plaintiff in item 9(b) of his declaration of July 9, 1985:

> 'One of the grounds for invalidating Plaintiff's May 17, 1982 service on the California Supreme Court was that his 222-page inclusive brief which accompanied the summons was not a "complaint." Since none of the Defendants had filed a responsive pleading in August 1983 (1½ years after filing of the case) and none has been filed even now, 3½ years after filing, Plaintiff was entitled to file without leave from the Court his supplemental pleading noting that his original grievances were perpetuated in the 1983 districts. This supplemental pleading was not questioned by the Court nor any party when Plaintiff filed motions pursuant to it in December 1983, yet after ignoring these

motions for nearly four months the Court refuses to take cognizance of them on the ground that Plaintiff's supplemental pleading was filed without prior leave of the Court. Because the Court waited so long before notifying Plaintiff of its refusal to take cognizance of his motions relating to the 1984 elections, prompt consideration of Plaintiff's April 10, 1984 motion for leave to amend was an urgent priority; yet the Court refused to hear it until August 27, 1984. Then on April 4, 1985 Judge Karlton attached a one-sentence denial of leave to amend as a footnote to his order denying Plaintiff's joinder motion. Even though Plaintiff's challenge to the 1983 districts was the reason given at the August 27, 1984 hearing by Judge Karlton for taking Plaintiff's motion for leave to amend under advisement, the April 4, 1985 order does not even address this issue.'

"Thus the 1984 districts are 'not before the Court' because the Court has turned its back on them and thereby ignored Rule 15(a) of the Federal Rules of Civil Procedure."

22.07 Plaintiff's motion for reconsideration states at 15 Record 248-249:

"The cited portion of Roe v. Wade provides:

'But when, as here, pregnancy is a significant fact in

> the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). See Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Carroll v. Princess Anne, 393 U.S. 175, 178-179 (1968); United States v. W.T. Grant Co., 345 U.S. 629, 632-633 (1953).
>
> 'We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.' 113 U.S. at 125.

Clearly Halliwell v. Eu meets the requirements of 'capable of repetition, yet evading review' to an even greater degree than Roe v.

Wade, as the California Supreme Court's interim redistricting plan has 'come to term' before the District Court phase of litigation is complete, much less the 'usual appellate process.'"

22.08 Plaintiff's motion for reconsideration states at 15 Record 244-247:

"The order of July 9, 1984 (at 4) cites N.A.A.C.P. Western Region v. City of Richmond (1984) 743 F.2d 1346, 1353 as setting forth the elements of the 'capable of repetition, yet evading review doctrine.' NAACP notes:

> 'The Supreme Court has stated, however, that a case is not moot if the underlying dispute between the parties is "capable of repetition, yet evading review." Nebraska Press Assn. v. Stuart, 427 U.S. 539, 546, 96 S.Ct. 2791, 2797, 49 L.Ed.2d 683 (1976), quoting Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). Two elements are necessary for a dispute to satisfy this standard: (1) the duration of the challenged action or injury must be too short to be fully litigated; and (2) there must be a reasonable likelihood that the same party will be subject to the action again. See Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 348, 46 L.Ed. 2d 350 (1975); Planned Parenthood v. Arizona, 718 F.2d 938, 949

(9th Cir. 1983).' Id.

'A case does not become moot even if a defendant voluntarily discontinues the allegedly illegal activity. See Iron Arrow Honor Society v. Heckler, ___ U.S. ___, 104 S.Ct. 373, 375, 78 L.Ed.2d 58 (1983). Otherwise, the defendant would be free to "return to his old ways" once the danger of a lawsuit has passed. Id., quoting United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). To establish mootness, therefore, the defendant must carry the "heavy burden" of demonstrating that "there is no reasonable likelihood that the wrong will be repeated." Id. Richmond has made no such showing here.' Id., n. 6.

"Clearly Plaintiff's challenge to the interim redistricting plans adopted in Assembly v. Deukmejian (1982) 30 Cal.3d 638 meets both of the criteria listed above. (1) there were 277 days between the adoption of the contested districts on January 28, 1982 and the November 1, 1982 General Election, and 271 of these days had passed before the three-judge tribunal (required by 28 U.S.C. § 2284 for the adjudication of constitutional challenges to statewide redistricting plans) held its first hearing. (2) Every voter in the state is subject to a redistricting plan such as Plaintiff challenges, and this will

always be the case since the 'ripple effect' of changing any district boundary inevitably links the interests of residents of all districts. See Swann v. Adams (1967) 385 U.S. 440, 443.

"NAACP supra relies upon Nebraska Press Ass'n v. Stuart (1976) 427 U.S. 539, which states:

> 'The order at issue in this case expired by its own terms when the jury was impaneled on January 7, 1976. There were no restraints on publication once the jury was selected, and there are now no restrictions on what may be spoken or written about the Simants case. Intervenor Simants argues that for this reason the case is moot.
>
> 'Our jurisdiction under Art. III, § 2, of the Constitution extends only to actual cases and controversies. Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975); Sosna v. Iowa, 419 U.S. 393, 397-403 (1975). The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).
>
> 'The controversy between the parties to this case is "capable of repetition" in two senses. First, if Simants'

> conviction is reversed by the Nebraska Supreme Court and a new trial ordered, the District Court may enter another restrictive order to prevent a resurgence of prejudicial publicity before Simants' retrial. Second, the State of Nebraska is a party to this case; the Nebraska Supreme Court's decision authorizes state prosecutors to seek restrictive orders in appropriate cases. The dispute between the State and the petitioners who cover events throughout the state is thus "capable of repetition." Yet if we decline to address the issues in this case on grounds of mootness, the dispute will evade review, or at least considered plenary review in this Court, since these orders are by nature short-lived. See, e.g., Weinstein v. Bradford, 423 U.S. 147 (1975); Sosna v. Iowa, supra; Roe v. Wade, 410 U.S. 113, 125 (1973); Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Carroll v. Princess Anne, 393 U.S. 175, 178-179 (1968). We therefore conclude that this case is not moot, and proceed to the merits.' Id. at 546-547.

The possibility of repetition in Stuart supra on account of a reversal of Simants' conviction and a new trial closely resembles the situation in Halliwell v. Eu, as the current congressional districts are the subject of ongoing litiga-

tion see Badham v. United States District Court for the Northern District of California (1983) 721 F.2d 1170, and they could well be replaced by a court-ordered plan if found to be unconstitutional."

22.09 Plaintiff's motion for reconsideration states at 15 Record 249-251:

"The order of July 9, 1985 notes [at 15 Record 200] that controversies involving elections are often within the category of 'capable of repetition, yet evading review' and cites Rosario v. Rockefeller, 410 U.S. 752, 756 n. 5 (1973) and Anderson v. Celebrezze, 460 U.S. 780, 784 n. 3 (1983) as examples.

"The cited portion of Rosario v. Rockefeller notes:

> 'Although the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot, since the question the petitioners raise is "'capable of repetition, yet evading review.'" Dunn v. Blumstein, 405 U.S. 330, 333 n. 2 (1972); Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).'

This case clearly effectuates the principle that the rights involved in election cases are so fundamental that petitioners may challenge a possible repetition as to others even if they themselves 'will be eligible to vote in the next

scheduled New York primary.' Another of this court's references, NAACP supra, exemplifies the same waiver of 'the prudential rule that a litigant has standing to vindicate only his own constitutional rights' because 'The concern that constitutional adjudication be avoided whenever possible is simply outweighed by the risk to society of losing the speech of those deterred from engaging in protected expression. Munson, 104 S.Ct. at 2847.' 743 F. 2d at 1352.

"The portion of Anderson v. Celebrezze notes:

> 'The Secretary of State promptly appealed and unsuccessfully requested expedited review in both the Court of Appeals and this Court, but apparently did not seek to stay the District Court's order. [Footnote: After the Court of Appeals denied a motion for expedited appeal, respondent filed a petition for a writ of certiorari before judgment in this Court, together with a motion to expedite consideration of the petition. The motion and the petition were both denied before the election in November 1980. 448 U.S. 914 and 918 (1980). Even though the 1980 election is over, the case is not moot. See Storer v. Brown, 415 U.S. 724, 737, n. 8 (1974).] The election was held while the appeal was pending. In Ohio Anderson received 254,472 votes, or 5.9 percent of the votes cast;

> nationally, he received 5,720,060 votes or approximately 6.6 percent of the total.'

Here again the plaintiff (John Anderson) has no stake in the outcome of the litigation but 'the case is not moot.'

"This court has not cited any elections case declared moot for lack of a continuing injury which can 'be redressed by a favorable judicial decision,' and Plaintiff believes that no such case has occurred since Dunn v. Blumstein (1972) 405 U.S. 330 established the current application of 'capable of repetition, yet evading review' to political rights. Warth v. Seldin (1975) 422 U.S. 490, 499-500 does note that in ordinary circumstances respect for the properly limited role of courts in a democratic society supports prudential limitations on adjudication, and these prudential limitations do require that a plaintiff have a distinct personalized interest to defend so that courts avoid abstract decisions other governmental institutions are more able to make. However, these prudential limitations do not apply where political rights are involved.

> 'We do not believe that prudential notions of self-restraint in the area of standing are properly invoked in cases involving the dilution of an individual's fundamental voting rights: when a complaint alleges injury from a clogged democratic process,

> it would be anomalous to require the plaintiff to seek relief from political institutions.' O'Hair v. White, 675 F.2d 680, 689 (5th Cir. en banc 1982)."

22.10 Plaintiff's motion for reconsideration states at 15 Record 234-235: "However, the cited portion of Storer rejects this court's position that facial alteration of the plan (by embodying very similar districts in new legislation) deflects a challenge to the underlying districts. As Plaintiff noted at 19: 20-27 of his May 11, 1984 opposition to dismissal (13 Record 25):

> 'In Storer v. Brown (1974) 415 U.S. 724, 737, n. 8 the opinion notes, "The 'capable of repetition, yet evading review' doctrine, in the context of elections cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks." Storer also notes, "[adjudication] will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held."'

This doctrine is squarely applicable in the circumstances of an interim redistricting plan adopted when an election is close at hand, so according to Storer Plaintiff's challenge (filed on February 19, 1982 against districts to be used in the June and November 1982 elections)

is clearly not moot.

"Moreover, even if there were no close similarity between the districts now in use and those originally challenged by Plaintiff, Democratic Party of the United States v. Wisconsin (1981) 450 U.S. 107, 115 n. 13, quoted by Plaintiff at 18:6-18 of his May 11, 1984 opposition to dismissal (13 Record 24), squarely rejects mootness for even a one-election court order:

> '"[E]ven if the order were clearly limited to the 1980 election year, the controversy would be properly before us as one 'capable of repetition, yet evading review.' Rosario v. Rockefeller, 410 U.S. 752, 756 n. 5 . . . ."'

"The order of July 9, 1985 [at 15 Record 199] cites NAACP, Western Region v. City of Richmond, 743 F. 2d 1346, 1352-1353 (9th Cir. 1984) in support of mootness of Plaintiff's claims on account of 'a change of circumstances.' However, NAACP speaks of 'effects' and 'alleged violation' which must continue to exist to avoid mootness -- not, as this court seeks to imply, of a requirement that the vehicle causing an injury must remain unchanged:

> 'A case becomes moot when interim relief or events have eradicated the effects of the defendant's act or omission, and there is no reasonable expectation that the alleged violation will recur. [Citations.]' 743 F.2d at 1352-1353. Emphasis added."

22.11 Plaintiff's motion for reconsideration states at 15 Record 252-253: "However, Iron Arrow is inapplicable for several reasons, most notably because that opinion stresses the independence of the University's action quite apart from any regulatory action by defendant Heckler. The syllabus of the opinion (104 S. Ct. at 373) states:

> 'All-male honorary organization brought action seeking declaratory and injunctive relief to prevent the Secretary of Health and Human Services from interpreting a regulation so as to require a private university to ban it from campus.'

The Court's opinion notes:

> 'The Trustee Executive Committee had adopted that position on July 15, 1980, determining that Iron Arrow may return to campus only if it satisfies the code for all student organizations, a code which includes a policy of non-discrimination. The President's letter moreover informed Iron Arrow that the University would maintain that position, regardless of the outcome of Iron Arrow's lawsuit. Specifically the letter stated that "The question is not only what the law requires. The most important question is what our University should do, in fairness to all students, whether the law requires it or not." (Emphasis in original.)'

In Halliwell v. Eu Plaintiff has

stressed from the outset and provided frequent demonstrations of the fact that the contested districts and their essentially unchanged successors were imposed by means of political collusion of Democratic officials in the legislative, executive and judicial branches of government.

"Moreover, Iron Arrow (104 S. Ct. at 375) stresses that there must be a 'discontinuance of challenged activities' and that 'there is no reasonable likelihood that the wrong will be repeated.' Perpetuating the grievances challenged in a lawsuit, as the new districts unequivocally do, completely destroys any support for a finding of mootness that might be gleaned from Iron Arrow supra. This is especially so since the A.B. 301 plan is the very plan adopted by the California Supreme Court, so when the Legislature (both houses of which are defendants in this lawsuit) replaced the court-ordered plan it was simply replacing a plan which it had originated."

22.12 The Court thus continues to refuse to recognize the existence of the Board of Equalization claim (based on a 27 percent disparity between the populations of largest and smallest districts) included in Plaintiff's Second Amended Complaint (at 4 Record 71). At 15 Record 361-368 Plaintiff recounts his arguments in support of this claim and his January 6, 1983, December 6, 1983, and March 13, 1984 motions for injunctive relief from Board of Equalization malapportionment which the

Court has insisted on ignoring.

22.13 The order of July 9, 1985 notes (at 15 Record 199); "On its own motion, the Court invited Defendant March Fong Eu, California Secretary of State, to move to dismiss this remaining [not counting Plaintiff's 1983 claims on which the Court refused to rule or the Board of Equalization claim on which the Court refused to rule or the motions for reconsideration re state legislative claims on which the Court refused to rule] claim." At 17 Record 133-146 Plaintiff shows how the motion authorized by the order of March 27, 1984 gave no notice of the scope of the subsequent dismissal.

"The order of March 27 clearly affirmed that

> '[before] a court may act on its own initiative in dismissing a complaint . . . the court must provide the plaintiff with notice and an opportunity to address the matter. Wong v. Bell, 642 F.2d 359 (9th Cir. 1981). The Court has previously determined that Defendant Eu is the proper party to represent the interests of the congressional delegation. The Court will, therefore, order the Plaintiff and Defendant Eu to brief the sufficiency of the Plaintiff's complaint insofar as it challenges the constitutionality of the congressional districts.' (12 Record 253.)

"Defendant responded to this instruction by filing a motion to

dismiss Plaintiff's congressional claim. Neither the District Court's instructions nor the Defendant's motion provided Plaintiff with notice that his Board of Equalization claim stood in jeopardy of dismissal if the Court granted Defendant's congressional motion. Neither is there the slightest suggestion in the order or in briefing filed in connection with Defendant's dismissal motion that Plaintiff need defend against dismissal of the action in its entirety.

2. Defendant's Motion to Dismiss Plaintiff's Congressional Claim

a. First Ground: Defense of Adoption of the Contested Districts on Equitable Grounds

"Defendant's 'Memorandum of Points and Authorities in Support of Motion to Dismiss' (12 Record 458-463) presents three grounds for the dismissal of Plaintiff's congressional claim. Defendant argues:

> 'THE APPLICABLE FEDERAL LAW CLEARLY ESTABLISHES THE PROPRIETY OF THE CALIFORNIA SUPREME COURT'S EMERGENCY ADOPTION OF THE LEGISLATURE'S REDISTRICTING PLAN.
>
> 'Even a cursory reading of the California Supreme Court's opinion in Assembly v. Deukmejian [citation], makes it clear that the Court found itself in the same uncomfortable position faced by many federal courts in the two decades since Baker v. Carr -- the Court was called upon to

address challenges to a redistricting plan at a time when an approaching election made it impossible or inequitable for the Court to consider alternatives to the challenged plan. The federal courts have developed a body of law to apply in such circumstances; its application in this case requires that the action be dismissed.

'The federal courts have widely recognized that, in circumstances like those faced by the California Supreme Court, there is no constitutional bar to permit the upcoming elections to proceed under a challenged redistricting plan in order to ensure an orderly opportunity for voters to exercise their franchise. E.g. Reynolds v. Sims, 377 U. S. 533, 585 (1964); Wells v. Rockefeller 394 U.S. 542, 547 (1969); Cosner v. Dalton 522 F.Supp. 350, 363-364 (E.D. Va. 1981). See also Upham v. Seamon, 456 U.S. 37, 44 (1982). Indeed the courts have recognized that the constraints imposed by the practicalities of the electoral process may even justify temporary use of a plan that has actually been found to be unconstitutional.' (12 Record 460-461.)

"In his opposition to Defendant's motion (at 13 Record 1-57) Plaintiff responds to the cases cited in her memorandum:

'In Latino Political

Action Comm. v. City of Boston (1983) 568 F.Supp. 1012, 1020 the court notes:

> "In Sims the Supreme Court acknowledged that under certain circumstances, equitable considerations might justify a court in withholding immediate relief even though an apportionment scheme is found invalid. Sims in no way requires a Federal Court to allow an illegal election." Emphasis in original.

'In Wells the court ruled on the constitutionality of the contested districts within a month of their enactment. [Supporting quotation from 394 U.S. at 547.] The California Supreme Court waited 4½ months after the California Legislature adopted its redistricting plans and then refused to rule on their constitutionality.

'Defendant cites Cosner v. Dalton 522 F.Supp. 350, 363-364 (E.D. Va. 1981) as involving "circumstances like those faced by the California Supreme Court," but in Cosner the court acted two weeks after the Legislature adopted a redistricting plan when it ruled:

> ". . . . .
> ". . . Interim relief using an unconstitutional apportionment plan is permissible, when, as

> here, necessary election machinery is already in progress for an election rapidly approaching. . . .
>
> "Because Virginia's citizens are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan, we will limit the terms of members of the House of Delegates elected in 1981 to one year." Id. at 363-364.

Whereas the Cosner court shortened the terms of office under the interim plan to only a year, this court scuttled Plaintiff's proposal for such a remedy in Halliwell v. Eu simply by ignoring his motion of January 6, 1983 until March 27, 1984, when it established a briefing schedule for the congressional aspect of this motion.

'Upham clearly limits the forgiveness of constitutional defects in interim redistricting plans to those which are practically unavoidable:

> "It is true that we have authorized District Court to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to legal requirements, even constitutional requirements. [Citations.] Necessity has been the moti-

> vating factor in these situations." Upham v. Seamon (1982) 456 U.S. 37, 44.

Defendant attempts to justify the adoption of plans with gross constitutional defects in preference to alternative plans superior by every constitutional criterion by noting that the California Supreme Court did not address constitutional challenges to the Legislature's plans. Defendant notes [at 12 Record 462]:

> "Here, of course, no allegation of unconstitutionality was ever finally addressed by the Court. Where no determination of unconstitutionality was made, the basis for permitting the plan to go forward on an emergency basis is further strengthened. It is clear that the United States Constitution embodies a decided preference that appropriate state agencies, including state courts, be given the first opportunity to resolve reapportionment disputes. E.g., Scott v. Germano 381 U.S. 407, 409."

'However, Scott provides no support for a federal court's automatically accepting a state court's characterization of its own actions, especially when the state court

has employed protracted delay to create practical circumstances which allegedly leave no time for that court to determine the validity of redistricting plans not legally enacted but adopted on the state court's own authority.

> "The District Court shall retain jurisdiction of the case and in the event a valid reapportionment plan for the State Senate is not timely adopted it may enter such orders as it deems appropriate, including an order for a valid reapportionment. . . ." Scott v. Germano (1965) 381 U.S. 407, 409. Emphasis added.' (13 Record 28-31.)

"In ruling on Defendant's motion the order of July 9, 1985 takes no position on the above equitable defense of the action of the California Supreme Court in adopting the contested districts as its own reapportionment plan.

b. Second Ground: Comity and Federalism Require Dismissal.

"Defendant's memorandum suggests that even if the District Court does not accept the California Supreme Court's equitable reasoning it should still defer to the State Court:

> 'Where, as here, the state courts adopt an emergency resolution that has enjoyed wide support in the federal court, including the United States

> Supreme Court, basic considerations of federalism and comity require that the federal courts accord proper respect to the decisions of state courts. In the circumstances presented by Plaintiff Halliwell's complaint and the decision of the California Supreme Court in Assembly v. Deukmejian, it is clear the applicable principles of law and equity require that the complaint be dismissed.' (12 Record 462.)

"This contention had been rejected by the order of July 1, 1982 (Item #5):

> 'As for comity and federalism, those doctrines neither require nor permit this court to reject out of hand a constitutional challenge to reapportionment plans devised by a state, whether those plans were adopted by the state legislature or by a final decision of the state's highest judicial body.' (4 Record 53.)

c. Third Ground: 1982 Elections Moot Plaintiff's Congressional Claim.

"As another line of defense against Plaintiff's congressional claim the Secretary of State argues:

> 'Plaintiff obviously disfavors the districts created by A.B. 301. Apparently, his disfavor was shared by other Californians who exercised their franchise to vote the plan down in the 1982 general election. Having succeeded in so doing, they need no further

> prospective relief, which was effectively mooted by the successful referendum campaign against the plan. No prospective relief with regard to the obsolete districts is required or permissible in this case.
>
> 'Retrospective relief, if indeed Plaintiff has prayed for it (see order at 8), is similarly inappropriate. We are unaware of any reported instance in which a reapportionment remedy has called members of the United States House of Representatives back from Washington or subjected them to a second election campaign before the expiration of their term. This is hardly a surprising fact, particularly in view of the obvious conflicts such a course of action would create with the federal constitutional mandate, contained in Article I Section 2, that such representatives shall serve a term of two years.' (12 Record 460.)

"In Plaintiff's opposition (at 13 Record 40-52) he reviews 'Precedents for Federal Invalidation of Elections and Shortening of Terms of Illegally Elected Officeholders.' Plaintiff also contends:

> 'Furthermore, in Davis & Ward v. Adams (1970) 400 U.S. 1203 Justice Black (in chambers) held that post-election relief in the form of invalidating the results applies fully to congressional elections. Applicants Davis and

Ward were ordered placed on the 1970 Florida ballot as candidates for the United States House of Representatives because "even if they were elected, Florida could challenge them as having failed to qualify." Id. at 1204.' (13 Record 26-27.)

"With respect to the alleged mootness of Plaintiff's challenge to the 1982 congressional districts his opposition notes:

'In Federal Practice and Procedures § 3533 Wright and Miller note:

"In order to establish mootness, the court wrote [in United States v. W.T. Grant Company (1953) 345 U.S. 629] the defendant who has discontinued challenged activities must carry a heavy burden of demonstrating that there is no reasonable expectation that the wrong will be repeated." Id. at 266-267.

Plaintiff has documented at 10 Record 187-189, 10 Record 332-355, and 10 Record 171-176 the facts showing that the new congressional districts are essentially unchanged from those used in 1982 and that the minor changes which have been made have increased the population disparities among congressional districts. Wright and Miller supra also note:

"Passage of new legislation that does not

satisfy the principles urged in attacking old legislation similarly does not moot the attack. . . . Any other conclusion would have created a superb method for resistant legislatures to avoid Supreme Court review." Id. at 278-279.

"Challenges to election requirements have frequently been determined after the passage of the election immediately involved in the initial litigation." Id. at 288-289.

"In American Party of Texas v. White (1974) 415 U.S. 767 the opinion notes:

"Although the November 1972 election has been completed and this court may not grant retrospective relief that would affect the outcome, this case is not moot. See Rosario v. Rockefeller, 410 U.S. 756 n. 5 (1973); see also Storer v. Brown, 415 U.S. at 737 n. 8." Id. at 77 n. 1.

"Since it was a temporary measure, this primary financing legislation has expired and it has been replaced by new legislation. . . . The new legislation is also comparable to its predecessor [so the] . . . recent amendments to the 1972 . .

> . law have not mooted this controversy. . . . [I]n view of the special nature of election challenges in general and this short-term . . . measure in particular, we proceed to evaluate appellants' claims on the merits." Id. at 791 n. 23.

'In Rosario v. Rockefeller (1973) 410 U.S. 752, 756 n. 5 the opinion notes: "Although the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot, since the question the petitioners raise is '"capable of repetition, yet evading review"'".

'In Democratic Party of the United States v. Wisconsin (1981) 450 U.S. 107, 115 n. 13 the opinion notes:

> "This case is not moot. The Wisconsin Supreme Court's order is not explicitly limited to the 1980 convention. The effect of the order 'remains and controls future elections.' Moore v. Ogilvie, 394 U.S. 814. In any event, even if the order were clearly limited to the 1980 election year, the controversy would be properly before us as one 'capable of repetition, yet evading review.' Rosario v. Rockefeller,

410 U.S. 752, 756 n. 5; Dunn v. Blumstein, 405 U.S. 330, 333 n. 2." Emphasis added.

'An additional aspect of the 1982 congressional elections capable of repetition relates to the authority of the California Supreme Court to adopt a congressional redistricting plan on its own authority without even considering compliance with the strict population equality mandated for congressional districts by Article I § 2 of the Federal Constitution. The time has come to adjudicate the question posed by Judge Karlton at the October 27, 1982 hearing:

> "Counsel, are you asking us to believe that the California Supreme Court adopted a plan which was challenged as unconstitutional without considering whether it comported with federal constitutional standards? If that is your argument, would any court then defer to that court?" 11 Record 214.'

(13 Record 22-25.)

"The District Court never actually ruled on the mootness contention raised by Defendant. Instead the Court found mootness on its own grounds, noted below.

3. District Court's Finding of Mootness

"The order of July 9, 1985 took

no position on the authority of a federal court to shorten terms. The court had simply waited until the terms of those elected from the challenged districts (which had had nearly a year to run when briefing was completed on the motion brought forward pursuant to the order of March 27, 1984) had expired.

"Plaintiff had also sought prospective relief in the form of depriving those elected from specially tailored malapportioned districts (see 13 Record 15-16) of their designation as incumbents in the next election. The Court did not rule on this remedy either, but simply waited until the next congressional election had passed.

"The Court then declared Plaintiff's congressional claim moot because, as the order of July 9 stated,

> 'If the relief sought has become impossible to grant due to the passage of time or a change in circumstances . . . the case is "moot," and must be dismissed for lack of constitutional authority to proceed.' (15 Record 199.)

4. Plaintiff's Motion for Reconsideration

"In his memorandum supporting reconsideration of the dismissal of his congressional claim (15 Record 228-270) Plaintiff protests the dismissal of his congressional claim by simply allowing his proposed remedies to become obsolete and refusing to allow him to bring forward revised remedies that were still feasible. Plaintiff cites a

recent Supreme Court decision (not available when briefing was completed on Defendant's motion) in support of his reconsideration motion:

> 'In Firefighters Local Union No. 1784 v. Stotts (1984) 104 S.Ct. 2576, (a case cited by Plaintiff at 13 Record 475-476 in support of his August 3, 1984 rebuttal in behalf of his motion to reconsider the order of March 27, 1984), Justice O'Connor notes: "When collateral effects of a dispute remain and continue to affect the relationship of litigants, the case is not moot." Id. at 2591. Moreover, the residual effects in Stotts, a few months' advantage in seniority gained before the laid-off white firemen were rehired, is similar in its continuing impact to the advantage of incumbency in politics.
>
> 'Plaintiff happens to be represented by Congressman Mel Levine, one of the six new Democratic Representatives elected from specially tailored malapportioned districts in 1982, so the following ruling of the Stotts court is also appropos: "As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute. Powell v. Mc Cormack, 395 U.S. 486, 496-498 (1969)."' (15 Record 242.)

"Plaintiff also protests (at 15 Record 232-235) the refusal of the District Court to reconcile its finding of mootness with American Party of Texas v. White (1974) 415 U.S. 767 and Democratic Party of the United States v. Wisconsin (1981) 450 U.S. 107. Plaintiff also complains that an order which relies entirely upon cases not presented in Defendant's memoranda in support of her motion makes a mockery of his 'opportunity to address the matter' before 'a court may act on its own initiative in dismissing a complaint' which the order of March 27 notes (at 12 Record 253) is a plaintiff's right. Plaintiff then demonstrates that the District Court has misrepresented most of the cases it cites without quoting or quotes out of context in support of its sua sponte finding of mootness. See 15 Record 244-253."

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Judges, Kennedy, Karlton and Ramirez

Item # 23 (15 Record 353-354)

Filed August 5, 1985

Plaintiff has filed a motion for reconsideration of the court's order of July 9, 1985, which dismissed this action.[23.01] The court has determined that it may dispose of this motion without the benefit of oral argument. Accordingly, the motion is hereby submitted on the record and papers currently before the court. See Local Rule 230 (h), E.D. Cal. (1984).[23.02]

Plaintiff's basis for seeking reconsideration is a disagreement with the court's reasoning in disposing of this case. This is insufficient. See Local Rule 230(k).[23.03] The appropriate method for challenging this court's reasoning is an appeal to an appropriate tribunal.

Accordingly, plaintiff's motion is DENIED without leave to renew it.[23.04]

IT IS SO ORDERED.

/s/ Anthony M. Kennedy, Judge
Ninth Circuit Court of Appeals

/s/ Lawrence K. Karlton, Chief Judge
United States District Court

/s/ Raul A. Ramirez,
United States District Judge

Dated: July 23, 1985

Plaintiff's Contextual Footnotes:

23.01 Note how the Court focuses on the single sentence of the order of July 9, 1985 that calls for the termination of the entire action. The critical issue facing Magistrate Mix (and soon thereafter Judges Kennedy and Ramirez) is discussed (at 15 Record 188-194) in Plaintiff's affidavit of July 9, 1985, which crossed in the mails with the order of the same date but which the District Court had ample opportunity to consider before issuing its order of August 5, 1985:

"It is Plaintiff's contention that from the outset of these proceedings Judge Karlton has consistently avoided consideration of Plaintiff's central claim, that a conspiracy has existed and continues to exist among Democratic officials to force the use of unconstitutional state legislative and congressional districts biased in favor of Democratic candidates and to obstruct adjudication of the constitutional defects in these districts. Plaintiff also contends that every procedural ruling by Judge Karlton and his repeated protracted refusals to rule have had the effect of aiding and abetting this conspiracy.

1. "At the outset of proceedings, faced with a complaint alleging deliberate sabotage of the political process to secure partisan advantage, Judge Karlton allowed Defendant to avoid filing a responsive pleading on account of an utterly frivolous series of challenges to

the adequacy of service of process. When Plaintiff tried to secure implementation of the expedited consideration requirement of 28 U.S.C. § 2284 with a motion to establish a calendar for consideration, Judge Karlton simply refused to act, on the grounds that 'You can't just invent motion.'

2. "When Plaintiff sought to bar further irreversible steps to implement the contested districts until their constitutional defects had been ameliorated to the extent possible by means of whole-precinct swaps among districts, Judge Karlton gave priority to his vacation plans, thereby delaying consideration of this TRO proposal for a critically important two weeks. After Defendant had completed all the activities Plaintiff sought to restrain between notification of Plaintiff's motion and the hearing on it, Judge Karlton refused to consider Plaintiff's proposals to undo these actions on the ridiculous ground (when federally protected voting rights are at stake) that 'federal courts have no authority to tell local officials how to conduct elections.'

3. "Three weeks after filing this action Plaintiff sought to facilitate early intervention by the Legislature and any of the other parties to Assembly v. Deukmejian by providing them with a 222-page document combining his complaint with the evidence and authorities supporting his claims, but both the Senate and the Assembly waited nearly two months before interven-

ing. The Senate was prepared to proceed at the time of intervention, but, to allow the Assembly several weeks for preparation of its own dismissal motion and to accommodate the scheduling needs of Assembly counsel, Judge Karlton postponed all further consideration of the case until after the June primary election.

4. "Although the dismissal motions filed by Defendants challenged Plaintiff's original complaint and Judge Karlton rejected all of their grounds for dismissal, Judge Karlton (without any warning to Plaintiff) seized upon a mislabelling of Plaintiff's inclusive brief as grounds for granting his own dismissal motion. Judge Karlton proclaimed his disdain for Plaintiff's detailed charges of political collusion, noting:

> 'If Mr. Halliwell was a friend of the California Court for purposes of [Assembly v. Deukmejian], his friendship now appears to have degenerated into a bitter antipathy, characterized by attacks on that Cout's procedures and on the integrity and sagacity of its members. . . . As I shall explain [Defendants'] motions do not fatally pierce the Plaintiff's lawsuit. They are, however, a useful tool with which to hack away the necrotic claims and attached allegations, arguments, innuendo, and creative legal theories which form the bulk of this massive, sprawling complaint.

> In this manner I hope to reveal whether there is any living tissue consisting of cognizable constitutional claims buried within this great flaccid carcass.'

In thus butchering Plaintiff's case Judge Karlton makes it clear that the concept of a government of laws and the equal protection of the laws guaranteed by the Fourteenth Amendment do not meet his definition of 'living tissue' as he rules: 'rights under state law exist only to the extent that the state supreme court recognizes their existence,' and, 'Put bluntly: whether the decision in Assembly v. Deukmejian accords with California law is not and cannot be a matter of concern to this Court.'

5. "The full three-judge panel refused to consider any of Plaintiff's motions from the time the panel was appointed by Judge Browning shortly after Judge Karlton's order of July 1, 1982 until one week before the November General Election; then the Court ruled that it was too late to interfere with the elections process. When the lame-duck Governor called an illegal special session on redistricting the Court refused Plaintiff's request for an emergency hearing and then postponed all action until after the Legislature elected from the districts rejected in the June referenda had enacted new referendum-proof districts to perpetuate itself in office.

6. "Plaintiff filed a motion seeking reconsideration of the order of

July 1, 1982 along with the truncated complaint filed in accordance with the restrictions imposed by that order, but in all its pre-election orders the three-judge court simply ignored this motion and considered only the portions of Plaintiff's case ruled cognizable by Judge Karlton. In January 1983, pursuant to a briefing schedule established by the Court, Plaintiff filed a series of specific motions seeking reinstatement of the claims excluded by each of Judge Karlton's dismissals without leave to amend and redress from the denial of due process manifest in Judge Karlton's no-notice sua sponte attack on Plaintiff's case. The three-judge panel has refused to rule on any of these motions and has never ruled in any fashion whatever on the vital political collusion issue.

7. "In January 1983 Plaintiff filed a motion (seeking redress from numerous specific violations of due process of law in Judge Karlton's conduct of the case) pursuant to 28 U.S.C. § 2284(b)(3), which provides, 'Any action of a single judge may be reviewed by the full court at any time before final judgment.' However, the full court refused to rule on the propriety of Judge Karlton's conduct, but instead ruled: '[T]he Plaintiff's displeasure with Judge Karlton's rulings does not provide a basis for his motion, even if those rulings were legally erroneous.' The full Court refused to lift Judge Karlton's total ban on communications between his law clerks and Plaintiff even

though Judge Karlton's staff freely discusses the case with Defendants' counsel; the three-judge panel simply ruled: 'The law clerk is the judge's employee, and his first obligation is to the judge for whom he is employed.'

8. "The only authority the full Court has ever delegated to Judge Karlton was to preside over the December 6, 1982 status conference and 'to make all determinations and issue all orders necessary to and resulting from that conference.' Yet the full Court has never established a procedure for handling motions addressed to it and has simply ignored many such motions for months and even years. After nearly two years of the full Court's refusing to discharge its responsibilities under 28 U.S.C. § 2284 ('[§ 2284] provides for three judges . . . to allow a more authoritative determination and less opportunity for individual predilection in sensitive and politically emotional areas . . . .' Swift & Company v. Wickham (1966) 382 U.S. 111, 119) Plaintiff protested:

> '[I]f the full panel should delegate any further operational authority to Judge Karlton without first addressing the propriety of his past stewardship of the case it will provide yet more evidence that judicial in-group solidarity has taken precedence over their oaths to uphold and defend the Constitution.'

During the 15 months since this protest the full Court has continued

its 'hands-off' policy and issued no rulings on any of the motions before it. Indeed it has now been nearly 2½ years since Judge Kennedy and Judge Ramirez have consented to appear in these proceedings in spite of Plaintiff's requests for hearings on the vital issues before the Court.

9. "Judge Karlton's treatment of the aspects of the case left to him by the full Court has consisted of delay, delay and yet more delay followed by superficial rulings which completely ignore the issues which Judge Karlton has pondered at such length.

"(a) Plaintiff joined the California Supreme Court as a defendant in these proceedings on May 17, 1982 and has supplied both Chief Justice Bird and the Deputy Attorney General representing her with copies of every document filed by the Court or any party in these proceedings. The California Supreme Court did not challenge its status in the case until January 1984, and Plaintiff filed a response to this challenge within the same week. On March 27, 1984 the Court ruled that Plaintiff's joinder had been defective, and Plaintiff filed a motion in response to this ruling on April 10, 1984. Due to a mixup in the handling of Plaintiff's motions by employees of the Court (which the order of June 25, 1984 tries to blame on Plaintiff) Plaintiff's joinder motion was not heard by Judge Karlton until August 27, 1984. More than seven months later, on April 4, 1985, Judge Karlton issued

a one-sentence denial of Plaintiff's joinder motion which makes no attempt to explain how the state agency which adopted the districts challenged in these proceedings may be exempted from defending its actions against allegations that the districts violate federal law.

"(b) One of the grounds for invalidating Plaintiff's May 17, 1982 service on the California Supreme Court was that his 222-page inclusive brief which accompanied the summons was not a 'complaint.' Since none of the Defendants had filed a responsive pleading in August 1983 (1½ years after filing of the case) and none has been filed even now, 3½ years after filing, Plaintiff was entitled to file without leave from the Court his supplemental pleading noting that his original grievances were perpetuated in the 1983 districts. This supplemental pleading was not questioned by the Court or any party when Plaintiff filed motions pursuant to it in December 1983, yet after ignoring these motions for nearly four months the Court refuses to take cognizance of them on the ground that Plaintiff's supplemental pleading was filed without prior leave of the Court. Because the Court waited so long before notifying Plaintiff of its refusal to take cognizance of his motions relating to the 1984 elections, prompt consideration of Plaintiff's April 10, 1984 motion for leave to amend was an urgent priority; yet the Court refused to hear it until August 27, 1984. Then on April 4,

1985 Judge Karlton attached a one-sentence denial of leave to amend as a footnote to his order denying Plaintiff's joinder motion. Even though Plaintiff's challenge to the 1983 districts was the reason given at the August 27, 1984 hearing by Judge Karlton for taking Plaintiff's motion for leave to amend under advisement, the April 4, 1985 order does not even address this issue."

23.02 Plaintiff responds to the order of August 5, 1985 at 15 Record 372:

"If after briefing is completed the Court should decide that no new circumstances (including the perpetuation of the incumbency advantage in the 1984 elections) provide a basis for avoiding mootness (in spite of the holding of Firefighters Local Union No. 1784 v. Stotts (1984) 104 S.Ct. 2576) then Local Rule 230(h) allows the Court to dispense with oral argument. But Rule 230(h) does not provide for truncation of the briefing process, and this court is surely out-of-bounds in acting sua sponte on factual matters without the briefing mandated by Local Rules 230(c) and 230(d). Even if the Court is certain that nothing that Defendants might say in opposition to reconsideration or that Plaintiff might say in his rebuttal to that opposition will change its own disposition of the case, the Court must not exclude vital information from the record available to the U.S. Supreme Court by dispensing with briefing which provides and interprets the facts."

23.03 Plaintiff responds to the order of August 5, 1985 at 15 Record 369-371:

"The crucial portion of Local Rule 230(k) requires a motion for reconsideration to include 'what new or different facts or circumstances are claimed to exist which did not exist or were not shown upon such prior motion or what other grounds exist for the motion.' Emphasis added.

"The point of reference for determining whether there is anything worthy of further briefing presented by Plaintiff's motion for reconsideration is the nature of Defendant's mootness contention. The order of July 9, 1985 notes (at [15 Record 198]):

> 'On its own motion, the Court invited Defendant March Fong Eu, California Secretary of State, to move to dismiss [Plaintiff's challenge to the allocation of population among the congressional districts used in the 1982 elections). Defendant Eu's motion argued that Plaintiff's remaining claim was moot, since the 1982 elections have passed.
>
> 'For the reasons which appear below, the Court finds that Plaintiff's remaining claim is moot.'

However, there is no parallel at all between Defendant's mootness challenge [see 12 Record 459-460] and the reasoning of the order of July 9, 1985, and for a court to develop its own grounds [see 15 Record 199-200] and then not allow the parties to 'sharpen the presen-

tation of issues' (Baker v. Carr, 369 U.S. at 204) violates the mandate of Wong v. Bell, 642 F.2d 359 (9th Cir. 1981) which the order of March 27, 1984 affirms [at 12 Record 253].

'[Supporting quotation.]'

"Not only is this reasoning not that of the Court, the Court has in fact rejected this line of argument. See [15 Record 380-381] infra.

"Aside from the lack of any connection between the motion presented to the Court and the Court's action pursuant to that motion, there is also a sharp divergence between the circumstances at the time of the motion and those under which the Court acted. In his motion of July 17 Plaintiff certainly satisfied the requirements of Local Rule 230(k) by demonstrating 'different facts or circumstances [which] are claimed to exist which did not exist [in May 1984 when briefing was completed on Defendant's motion].' (The order of July 9, 1985 identifies one such changed circumstance, the expiration of the terms of congressmen elected under the challenged plan, as the pivotal factor in the case.) But this court waited until circumstances had changed in a decisive manner and then proceeded to evaluate this change of circumstances without benefit of briefing regarding their true implications."

23.04 Plaintiff discusses his response to the order of August 5, 1985 at 17 Record 149-150:

"One day after Plaintiff received the order of August 5, 1985 Plaintiff filed a motion (15 Record 357-382) which did not renew his challenge to any of the Court's reasoning but simply sought rulings on aspects of the case on which the three-judge panel had never taken any position. Plaintiff concluded this emergency motion,

> 'Supreme Court Rule 15.1(j)(i) requires an appellant to attach orders disposing of all aspects of the case which he wishes to appeal; this requirement must not be defeated by the lower court's refusal to issue any orders at all or orders so superficial that they completely evade the issues regarding the very aspects of the case where the court's position is weakest.
>
> 'Even a guilty man facing imprisonment is entitled to a fair trial, and however lacking in merit this court may consider Plaintiff's claims to be, Due Process of Law is no less mandatory where the litigant alleges an impairment of his political liberty.' (15 Record 379.)

"The District Court ignored Plaintiff's August 9, 1985 motion to secure rulings on aspects of the case left hanging by its sua sponte termination of the action."

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Magistrate Esther Mix

Item # 24a (15 Record 1-2)

Defendant's Request for Extension of Time

Filed June 17, 1985[24.01]

Plaintiff's Contextual Footnote:

24.01 This extension was requested by counsel for the Secretary of State to allow more time to draft a discovery stipulation required by Local Rule 251. Defendant declined to file the required papers because of the District Court's sua sponte termination of the entire action two days before the discovery submission deadline. See 15 Record 349.

It is hereby ordered by and between the parties through their attorneys of record that the aforementioned matter set for hearing on June 27, 1985 in the above-entitled court for plaintiff's motion to compel discovery has been continued to July 25, 1985. All pleadings, motions, and papers and other documents shall be filed with the court no later than July 11, 1985.

To date, Defendant EU has not applied to the Court for any extensions of time as to the particular matters for which this extension is sought.

/s/ Richard S. Nishite, Staff Counsel
Attorney for Defendant March Fong Eu
Dated: June 8, 1985

/s/ Michael Halliwell
Plaintiff in Propria Persona
Dated: June 10, 1985

IT IS SO ORDERED.

/s/ Esther Mix
Magistrate of the United States
District Court
Dated: June 14, 1985

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Magistrate Esther Mix

Item # 24b (15 Record 83-164)

Plaintiff's Case History and Current Status as of June 29, 1985[24.02]

Plaintiff's Contextual Footnote:

24.02 This supplemental memorandum in support of Plaintiff's motion of June 22, 1985 scheduled for hearing by Magistrate Mix on July 25, 1985 apparently caused the District Court to issue its July 9, 1985 sua sponte termination of the entire action which aborted Magistrate Mix's July 25, 1985 hearing. The total evasiveness of the order of August 5, 1985 (Item #23 supra) denying without briefing reconsideration of the termination of the action and the evasiveness of subsequent orders of August 19, 1986 (Item #25a infra), November 5, 1986 (Item #25b infra), and February 26, 1987 (Item # 25c infra), issued by the Ninth Circuit, makes it absolutely essential that any reviewing court be aware of the circumstances set forth in this memorandum.

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INTRODUCTION

Halliwell v. Eu is an omnibus challenge to the constitutionality of California's congressional, state legislative and Board of Equalization districts. A central focus of the case is a direct challenge to the tactics used by the California Supreme Court, the State Legislature, and the Secretary of State in their efforts to fabricate "compelling practical reasons" for the use of redistricting plans manifestly biased in favor of Democratic candidates and to prevent adjudication of the constitutionality of these plans. The only federal challenge to more than one of the seven redistricting plans imposed on the people of California by grossly unconstitutional means and despite the resounding rejection by the electorate of all but the BOE plan, Halliwell v. Eu documents a broad pattern of system-

atic political favoritism in violation of the Fourteenth Amendment and Article IV § 4 of the United States Constitution.

Since Democrats in all three branches of state government have abused their official positions for partisan purposes and thereby achieved the present distribution of political power in California, adjudication of this case has been tenaciously resisted. But rather than try to dispute the facts alleged by the plaintiff, none of the defendants has responded to them. Instead the State Supreme Court has resisted all attempts to involve it in the case so it need not defend its actions, and the other defendants, the Secretary of State, the State Senate and the Assembly, have resorted to a "run-out-the clock" strategy: the district court, which like most of the Ninth

Circuit and the State Supreme Court is dominated by Democratic appointees, entertains wave after wave of dismissal motions and then goes into long periods of hibernation. Meanwhile two complete cycles have been allowed to run their course without any adjudication of the constitutionality of the districts used -- a flagrant violation of 28 U.S.C. § 2284, which requires the expedited determination of constitutional challenges to statewide redistricting plans.

The following pages briefly summarize the legal and factual bases for the constitutional challenges to the districts themselves, then outline procedural tactics used to delay adjudication, indicating the issues still in dispute and the motions currently awaiting court action.

I. Legal Basis for Plaintiff's Claims

Halliwell v. Eu (Civ. S. 82-147-LKK) is a constitutional challenge to California's congressional, state legislative and Board of Equalization districts. It was filed in Sacramento Federal District Court on February 19, 1982.

A. Congressional Districts

The congressional challenge is based on unjustified population disparities in violation of Kirkpatrick v. Preisler (1969) 394 U.S. 526 and Karcher v. Daggett (1983) 103 S.Ct. 2653; on partisan gerrymandering which invidiously minimized Republican voting strength contrary to the opinions of Justice White in United Jewish Organizations v. Carey (1977) 430 U.S. 144, 167; Justice Blackmun in Connor v. Finch (1977) 431 U.S. 407, 430; Justice

Marshall in Mobile v. Bolden (1980) 446 U.S. 55, 119-120; Justice Powell in Karcher v. Daggett supra at 2688-2689; and Justice Stevens in Mobile v. Bolden supra at 86-87 and Karcher v. Daggett supra at 2668-2669; on abrogation of effective petitioning for redress of grievances by implementing plans blocked by referendum in violation of Williams v. Rhodes (1968) 393 U.S. 23, 30-31; on total disregard of the geographic integrity requirements of Article XXI of the California Constitution subject to federal enforcement under pendent jurisdiction as in Farnum v. Burns II (1983) 561 F. Supp. 83 and Schmidt v. Oakland Unified School District (1982) 73 L. Ed. 2d 245; and on ethnic gerrymandering which dilutes black and Hispanic representation to bolster the registration margins of Anglo Democrats as in Graves v. Barnes I (1973) 343 F.Supp. 704, 734,

affirmed sub. nom. White v. Regester (1973) 412 U.S. 755.

B. Senate Districts

The state senatorial challenge involves similar partisan gerrymandering, abrogation of referendum, violation of geographic integrity, and ethnic gerrymandering claims. The primary geographic inequality-of-representation aspect of the senate challenge deals with odd-even number switches which resulted in the disenfranchisement of some districts and the double representation of others. This practice is directly proscribed by In re Reapportionment of Colorado Legislature (1982) 647 P.2d 191, 199, 209, McCall v. Oregon Legislative Assembly (1981) 634 P.2d 223, 236, Dollinger v. Jefferson County Commissioners Court (1971) 335 F.Supp. 340, 343-344, and Sloan v. Donoghue (1942) 20 Cal.2d 607, 611. Since senate district misnumbering

emasculates the principle of effective majority control it also violates Reynolds v. Sims (1964) 377 U.S. 533, 563, 565. Less severe inequality of senate representation arises from Democratic districts which have systematically smaller populations than Republican districts, thus violating Roman v. Sincock (1964) 377 U.S. 695, 710.

C. Assembly Districts

The state assembly challenge involves grievances similar to those against the senate plan except as regards the geographic inequality-of-representation aspect. Even though the California Supreme Court invoked the de minimis population disparity requirement for court-ordered plans of Chapman v. Meier (1975) 420 U.S. 1, 26 to justify its adoption of the A.B. 300 districts, these districts violate the Chapman guidelines. The California High

Court violated the "fair notice" requirement of Bouie v. City of Columbia (1964) 378 U.S. 347, 352 in reversing its Legislature v. Reinecke I (1972) 6 Cal. 3d 595 precedent, and it overlooked gross drafting flaws which could not be reconciled with any interpretation of the legal descriptions of A.B. 300 without producing population disparities larger even than those allowable in legislatively enacted plans under White v. Regester supra.

D. Board of Equalization Districts

The contested Board of Equalization districts were ten years old, so unlike the state legislative districts, which had been adopted two years later, they were definitely due for prompt replacement under Reynolds v. Sims supra at 583-584. The one district with a Republican incumbent was 800,000 overpopulated, and the refusal of the Cali-

fornia Supreme Court to adopt new districts perpetuated the control of the four-member board by the Democratic Party. The inconsistent application of state law manifest in redrawing state legislative districts which were only 8 years old yet refusing to redraw Board of Equalization districts which were 10 years old constitutes invidious discrimination in violation of due process of law within the meaning of Bolling v. Sharpe (1954) 347 U.S. 497, 499. This is especially clear when one examines how and with what result for the two parties the legislative districts were redrawn.

E. Guaranty Clause Claim

The cumulative effect of the above constitutional violations has so undermined the integrity of California's institutions of representative democracy as to constitute violation of the guar-

anty of republican government in Article IV § 4 of the U.S. Constitution. Destruction of effective popular sovereignty is defined as a breach of the Guaranty Clause by Chisholm v. Georgia (1793) 2 U.S. 419, 448, 456-457, and abrogation of a written constitution is another Guaranty Clause violation under In re Duncan (1891) 139 U.S. 449, 461.

II. Factual Basis for Plaintiff's Claims

The factual basis for the above claims was documented in Assembly v. Deukmejian and has not been seriously disputed in Halliwell v. Eu.

A. Geographic Inequality of Representation

The population disparity between the largest and smallest congressional districts is anywhere between 7,000 and 11,000, depending on the procedure used to allocate populations of divided minimum-sized census units.

The average deviation among senate district populations is 6,000. Of the 10 districts more underpopulated than this, 9 had Democratic incumbents. Of the 9 districts overpopulated by the same amount, 6 had Republican incumbents. Elections due in normal course in 1982 were cancelled in three senate

districts where 100%, 95% and 72% of residents (were in districts which) had voted for senator in 1978; and elections were held two years early in three districts where 95%, 94% and 61% were already represented by senators who had been elected in 1980.

The maximum population disparity among the A.B. 300 Assembly districts is 55,000. Correction of textually demonstrable drafting errors would reduce this to 30,000.

The difference in population between the largest and smallest Board of Equalization districts is 1,600,000.

B. Partisan Gerrymandering

Democrat-leaning voters are allocated to control as many districts as possible, while Republican voting strength is minimized by packing Republican-leaning voters into politically lopsided districts which are grossly

distended and sometimes non-contiguous. Normal-curve probabilities are that when Republican candidates win a majority of the two-party vote Democratic candidates will win 54% of the congressional seats and 53% of the state legislative seats. Similar systematic dilution of the voting power of political elements of the electorate was ruled unconstitutional in Bandemer v. Davis (1984) 603 F.Supp. 1479. These lopsided political results are not due to any natural clustering of voters; indeed, if districts were constituted of compact groups of whole counties, cities or census tracts as required by Legislature v. Reinecke IV (1973) 10 Cal. 3d 396 and Article XXI of the California Constitution, Republicans would win about 53% of each type of districts whenever they won 50% of the two-party vote.

C. Referendum Stay Violation

In Assembly v. Deukmejian the majority of the California Court did not find any basis in California law to counter the clear language of Cal. Const. Art. II §§ 9, 10, which bars the use of redistricting plans challenged by valid referendum petition. Unequivocal California Supreme Court precedents since the initiative and referendum were adopted in 1911 have acknowledged that these powers reserved by the people are among "the most precious rights of our democratic process [which] it is our solemn duty to jealously guard." See Amador Valley School District v. State Board of Equalization (1978) 22 Cal.3d 208, 248. Yet the author of the Court's majority opinion, Chief Justice Rose Bird, declared that a "mere 5%" of the electorate should not be able to block the

Legislature's redistricting plans which were "the nearest approximation to the public will" and that the $12 million necessary to provide balloting on the contested districts before they were used would "have a serious impact on the state treasury." This position is squarely contrary to Terre Haute Railroad Co. v. Indiana (1904) 194 U.S. 579, 587 and Bullock v. Carter (1972) 405 U.S. 134, 147-148.

The majority opinion of Assembly v. Deukmejian also argued that the Court must assume that it was equally likely that the voters would accept the districts challenged by referendum, yet every opinion poll was predicting that at least 6 of 10 voters would reject the Legislature's plans. (In fact 61% voted against the assembly plan, 62% against the senate plan, and 64% against the congressional plan.)

D. Violations of Geographic Integrity

The amount of population sliced off cities small enough to fit into a single district is grossly excessive in all three plans: 760,559 in the congressional, 670,386 in the senatorial, and 1,000,407 in the assembly. At least 90% of this city fragmentation is unnecessary.

All three of the Legislature's redistricting plans excessively fragment counties small enough for a single district and overlap larger county lines far more than necessary. Population sliced off smaller counties in the congressional plan is 734,509, and more than 200,000 of this is unnecessary. There is a side-by-side overlap in two districts of the Santa Clara-San Mateo County line. Smaller county fragmentation in the senate plan is even more excessive;

it totals 885,648, of which 400,000 is clearly avoidable. There are six unnecessary overlaps of county lines, three of which involve side-by-side overlaps of the Los Angeles-San Bernardino county line. It is not necessary to divide any county small enough for a single assembly district, yet 8 such counties are cut up into 19 pieces. The aggregate population of the smaller portions of these unnecessarily divided counties is 572,851. While only 17 districts which overlap larger county lines are necessary to equalize assembly district populations, A.B. 300 contains 29 districts which overlap county lines.

All three redistricting plans include several districts which violate for demonstrably partisan purposes the regional integrity requirement of Article XXI.

E. Ethnic Gerrymandering

All three sets of contested districts give protection of Anglo-Democrat incumbents priority over ethnic representation. The congressional, senate and assembly plans segregate Pasadena blacks from the rest of that city and use them to bolster the Democratic registration of districts containing few other blacks. The black community in the East San Francisco Bay area is divided in all three plans to dilute black voting power.

The predominantly Hispanic areas of Los Angeles County grew more rapidly than the statewide average, but Los Angeles County grew less than the average, so increased Hispanic representation was sacrificed to save the seats of several incumbents. Los Angeles County Hispanics were given marginal control of

three congressional districts instead of the three safe seats they were entitled to on the basis of the population of heavily Hispanic areas, and Hispanics suffered greater discrimination in senate and assembly plans; a natural Hispanic senate seat was sacrificed to maintain a safe Anglo district for Senator Roberti; the Hispanic percentage in the assembly district once held by Senator Montoya was reduced enough to make secure the re-election of the Anglo incumbent; and another natural Hispanic assembly district was parcelled up among several Anglo Democrats whose districts were underpopulated.

F. Constitutional Flaws Perpetuated in 1983 Plans

Only minor changes were made in the 1981 redistricting plans when the legislature elected from these districts, in an illegal special session called by

lame-duck Governor Jerry Brown, acted to preserve their seats and, via illegal use of an urgency clause, to block any referendum challenge to their new districts. The new congressional districts were 90% unchanged from their previous versions, the new senate districts were 91% unchanged, and the Assembly kept 92% of California's population in the same districts as before. In all three sets of districts used in 1984 the few changes which were made served to aggravate constitutional defects present in A.B. 301, S.B. 99 and A.B. 300.

III. Defendants' Delaying Tactics

RATHER THAN CONTESTING THE LEGAL OR FACTUAL BASIS OF PLAINTIFF'S CLAIMS, DEFENDANTS IN HALLIWELL V. EU HAVE EMPLOYED A "RUN-OUT-THE-CLOCK" STRATEGY WHICH NOT ONLY PREVENTED ANY ASPECT OF THE CASE FROM BEING ADJUDICATED IN TIME FOR THE 1982 ELECTIONS BUT ALSO ALLOWED THE 1984 ELECTIONS TO GO FORWARD WITHOUT ANY ADJUDICATION OF THE CONSTITUTIONALITY OF THE DISTRICTS USED THEREIN. The procedural snarl which has totally obstructed the judicial process in Halliwell v. Eu amounts to a complete flouting of 28 U.S.C. § 2284, which provides for expedited consideration of constitutional challenges to statewide redistricting plans and requires that "The hearing shall be given precedence and held at the earliest practicable day."

A. Frivolous Challenge to Adequacy of Service

Instead of responding to plaintiff's allegations, defendant filed a dismissal motion "on the ground that the defendant has not been properly served with process in this action." Since plaintiff's personal service did not affect the adequacy of notice defendant's motion was frivolous in light of the harmless error provision of Rule 61: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." See also Securities and Exchange Commission v. Reisinger Industries (1977) 552 F.2d 15, 20.

Plaintiff immediately filed a counter motion requiring a responsive pleading by defendant but was unable to secure action on this motion without

another six weeks of delay. Plaintiff therefore made arrangements for his complaint to be served again on defendant, this time by a non-party to the action. This service was ruled inadequate by Judge Karlton because it was not accompanied by a fresh summons even though counsel for defendant was then standing before him. Plaintiff's third service of process included a fresh summons and was personally served by a non-party, so defendant withdrew her challenge to the adequacy of service. However, this challenge was later renewed on the ground that the receptionist who accepted service in behalf of the Secretary of State lacked the authority to do so. These delaying maneuvers were at last terminated by a fourth service of process.

B. Tactics Used to Evade Temporary Restraining Order

While defendant tied up the adjudication process with her challenges to adequacy of service the process of implementing the contested districts was continuing. Therefore plaintiff filed a proposal for a temporary restraining order to bar any further steps to implement the challenged districts which would preclude whole precinct swaps among districts to reduce their constitutional defects. During the two-week interval between plaintiff's TRO proposal and the earliest available hearing date, defendant issued instructions to local election authorities to accomplish all the activities plaintiff sought to restrain. On the day before the TRO hearing defendant provided her response to the Court (which was located only a few blocks from her Sacramento office)

and mailed a copy to plaintiff in Santa Monica, so he received it on the day after the hearing. On the basis of defendant's memorandum Judge Karlton ruled that any temporary restraining order would be "idle" even though local election officials had not yet acted on their instructions from the Secretary of State. Without allowing plaintiff to present his evidence of the administrative feasibility and constitutional necessity of his proposed whole-precinct swaps, Judge Karlton cut short the hearing, declaring, "Federal courts have no authority to tell local officials how to conduct elections." This is flatly contrary to Bell v. Southwell (1967) 376 F.2d 659, 665 and Gomillion v. Lightfoot (1961) 364 U.S. 339, 347.

C. Delay Produced by Late Intervention

When nearly three weeks had passed after plaintiff served his opening complaint without any response by defendant plaintiff made an effort to expedite intervention by any of the parties to Assembly v. Deukmejian in order to preclude any further delays. Plaintiff slightly revised his proposals for injunctive relief and included extensive legal and factual documentation in an inclusive complaint which he provided to all the parties to that action, urging them to intervene promptly if they intended to do so. This same brief and the letter urging prompt intervention was provided along with proof of service to the District Judge who had been assigned to Halliwell v. Eu, Lawrence K. Karlton.

In spite of plaintiff's urging that

any interested party intervene in early March 1982, the Legislature delayed its intervention until the Secretary of State had exhausted her delaying maneuvers over service of process, a period of nearly two months. When the Senate intervened counsel was prepared to proceed immediately and filed her dismissal motion at this time. Counsel for the Assembly had secured plaintiff's stipulation to the Assembly's intervention with a promise that this would not delay proceedings yet was unprepared to proceed, so Judge Karlton put off further consideration of the case (over plaintiff's vehement protest) until after the June primary in order to allow time for the Assembly to prepare its own dismissal motion.

IV. Judge Karlton's Order of July 1, 1982

A. Disposition of Defendants' Motions

Defendants' dismissal motions almost entirely ignored the substantive aspects of the case. Plaintiff's complaint was attacked on grounds of ripeness and mootness, comity, abstention, federalism, and full faith and credit; defendants also claimed that plaintiff has only grievances which he shares with the general public, that plaintiff does not allege that defendant March Fong Eu acted under color of state law, that his grievance was really against the California Supreme Court, and that federal jurisdiction was lacking to review the California court's finding that the recently tightened federal one-person-one-vote requirement was so compelling that state constitutional referendum

stay provisions must give way before it.

In his order of July 1, 1982 Judge Karlton ruled:

> "The motions to dismiss the complaint for failure to state a claim upon which relief may be granted, and for lack of subject matter jurisdiction are denied."

In discussing the various aspects of defendants' motions Judge Karlton notes:

> "The defendants contend that Mr. Halliwell, who sues merely as a taxpayer, a citizen, and a California voter, lacks standing to bring an action based on these claims. . . . The challenge to plaintiff's standing to sue is without merit. . . . Little need be said regarding the defendants' contention that 'as a matter of comity, abstention, equity and federalism, this court should refuse to review plaintiff's complaint. . . .' These considerations do not bear on the question whether the plaintiff has properly invoked the jurisdiction of this court, or whether he has stated a claim upon which relief can be granted. The defendants' remaining challenges to the complaint are even less substantial."

However, Judge Karlton also states in his order of July 1 that he has taken

the submitted motions as

> "a useful tool with which to hack away the necrotic claims and attached allegations, arguments, innuendo, and creative legal theories which form the bulk of [plaintiff's] massive, sprawling complaint. In this manner I hope to reveal whether there is any living tissue consisting of cognizable constitutional claims buried within this great flaccid carcass."

B. Dismissal of State Law Claims

The first of Judge Karlton's sua sponte dismissals without leave to amend ruled that all state law considerations were irrelevant in federal proceedings:

> "[T]he California Court could not have abridged the plaintiff's rights under California law in a manner cognizable by this court, for to the extent that those rights are susceptible to definition by a court of law, the California Supreme Court is the final authority as to what those rights are. . . . [R]ights under state law exist only to the extent that the state supreme court recognizes their existence. . . . Put bluntly: whether the decision in Assembly v. Deukmejian accords with California law is not and cannot be a matter of concern to this Court. . . . Thus to the extent that the com-

> plaint is based on alleged violations of the plaintiff's rights under California law, it must be dismissed without leave to amend for this Court lacks jurisdiction over the subject matter of those claims."

But the Supreme Court defines federal jurisdiction: "Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed depends upon state law." Fox River Paper Co. v. Railroad Commission (1927) 274 U.S. 651, 654.

Judge Karlton cites no interpretation of California law which precludes any of Plaintiff's state-law claims. At no time in these proceedings has anyone cited such a state law interpretation. The reason is simple: the basis for the abrogation of Plaintiff's rights under state law was the California Supreme Court's interpretation of federal law, and of course federal jurisdiction exists to review such a controlling

interpretation of federal law. Moreover, the Federal Constitution requires that state law interpretations "be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Hebert v. Louisiana (1927) 272 U.S. 312, 316. Even where vital political liberties are not involved the U.S. Supreme Court has ruled:

> "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded." Broad River Co. v. South Carolina (1930) 281 U.S. 537, 540.

C. Dismissal of Due Process Claims

Judge Karlton's second sua sponte dismissal without leave to amend asserts the notion that fundamental political liberties may be abridged by state courts without any process of law. The order of July 1 states:

> "It is clear that Mr. Halliwell has no standing to complain of procedural irregularities in the California Court's proceedings, for he was not a party to those proceedings and thus there was no particular process due him either as amicus curiae or as an interested spectator. . . . Nothing in [the Fourteenth] Amendment protects against all deprivations of life, liberty or property by the state. The Fourteenth Amendment protects only against deprivations 'without due process of law.' Parrat v. Taylor, 451 U.S. 527 (1981). It could hardly be said that Mr. Halliwell was denied due process by the State of California, for he never sought to invoke the process of the state except in his attempts to influence the California Supreme Court from his perch as amicus curiae in Assembly v. Deukmejian. As I have explained, a person acting as a friend of the court is not a party, and is not entitled to any particular procedural protections. In short,

> even if we assume that the California Court's interpretation of California law worked to deprive the plaintiff of some cognizable interest, 'the question remains what process [was] due.' Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The answer in this case is: none. . . . To the extent, therefore, that Mr. Halliwell complains of the judicial procedures employed by the California Supreme Court in its consideration and disposition of Assembly v. Deukmejian, he has not stated a claim upon which relief may be granted and indeed cannot state such a claim. All claims of this nature in the plaintiff's amended complaint are hereby dismissed without leave to amend."

Judge Karlton ignores the fact that standing depends upon whether one has been injured, not upon whether he had any procedural rights in the proceedings which gave rise to the injury. If, as Plaintiff alleges, the California Supreme Court has arbitrarily abridged Plaintiff's voting rights by invoking a compelling practical necessity which never existed for the use of the con-

tested districts, he certainly has standing to pursue this grievance. In Baker v. Carr (1962) 369 U.S. 186, 207-208 the U.S. Supreme Court ruled:

> "These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. . . . A citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution. . . . They are entitled to a hearing and to the District Court's decision on their claims. 'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.' Marbury v. Madison 1 Cranch. 137, 163."

And according to Brinkerhoff-Faris Co. v. Hill (1930) 281 U.S. 673, 679-680: "[A] transgression of the due process clause . . . is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute."

D. Dismissal of Ethnic Gerrymandering Claims

Without considering the injury in fact to Plaintiff's political interest arising from ethnic gerrymandering, the order of July 1 excludes this claim on account of Plaintiff's skin color:

> "As Mr. Halliwell conceded at oral argument, however, he is not a member of any such [black or Hispanic] ethnic or racial group. Once again, whatever the merits of his claim of unlawful political discrimination against persons of color, the plaintiff simply lacks standing to press that claim."

By taking judicial notice of plaintiff's skin color and dismissing plaintiff's ethnic gerrymandering claims because of plaintiff's complexion Judge Karlton assumes that the political power of ethnic minorities operates in a vacuum. There <u>are</u> a number of discriminations against members of minority groups which only indirectly affect members of the

larger society, but voting discrimination is not among them, since these minorities may provide the votes essential if one's own favored candidates are to have a chance of winning even if one is not a member of a minority group oneself; furthermore, the votes of legislators from other districts are essential if one's policy preferences are to be enacted into law. The only time a white's standing to seek relief from racial gerrymandering against non-whites has been challenged in a statewide redistricting case the court adjudicated the racial gerrymandering claim. See Sincock v. Gately (1967) 262 F.Supp. 739, 803-804, 847.

In Taylor v. Louisiana (1975) 419 U.S. 522, 526-527 the U.S. Supreme Court ruled:

> "Taylor was not a member of the excluded class; but there is

> no rule that claims such as Taylor represents may be made only by those whose defendants are members of the group excluded from jury service. . . . To exclude racial groups from jury service [is] at war with our basic concepts of a democratic society and a representative government."

The underlying rationale for not applying the usual limitations on standing to issues involving racial discrimination affecting the institutions of government is explained in Rose v. Mitchell (1979) 443 U.S. 545, 555-556:

> "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice . . . 'The injury is not limited to the defendant -- there is injury . . . to the law as an institution . . . and to the democratic ideal reflected in the processes of our courts.' [Citation.]"

Obviously the "basic concepts of a democratic society and a representative government" Taylor v. Louisiana supra which are "reflected in the processes of our courts" Rose v. Mitchell supra

must be reflected even more directly and clearly in the principles governing the procedures by which we elect our representatives.

E. Dismissal of Partisan Gerrymandering Claims

In his order of July 1 Judge Karlton also dismissed without leave to amend plaintiff's claims based on partisan gerrymandering unless such claims involved deviations from absolute population equality among districts. According to the order,

> "The plaintiff arguably has standing to complain of political gerrymandering that invidiously discriminates against members of his political party. Unfortunately for Mr. Halliwell, however, the partisan drawing of districts in a manner designed to maximize the electoral strength of the majority political party does not in itself give rise to a claim cognizable by this court. Gaffney v. Cummings, 412 U.S. 735, 752-755 (1973)."

However, the Court in Gaffney v.

Cummings held only that

> "A 'political fairness principle' that achieves a rough approximation of the statewide political strengths of the two major parties does not violate the Equal Protection Clause. Pp. 751-754." Id. at 735.

Since there is no way to maximize Democratic electoral strength without minimizing Republican strength, Judge Karlton's interpretation of Gaffney v. Cummings is squarely rejected by Justice White, the author of the Gaffney opinion.

> "In Gaffney v. Cummings the Court upheld a districting plan 'drawn with the conscious intent to . . . achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties.' 412 U.S., at 752. We there recognized that districting plans would be vulnerable under our cases if 'racial or political groups have been fenced out of the political process and their voting strength invidiously minimized,' id. at 754; but that was not the case there." United Jewish Organizations v. Carey (1977) 430 U.S. 144, 167.

F. Dismissal of Guaranty Clause Claims

Judge Karlton excluded all Guaranty Clause claims because: "This Court lacks jurisdiction over the subject matter of Guaranty Clause claims." The notion that federal courts lack subject matter jurisdiction over any portion of the United States Constitution is directly contrary to Article III § 2(1): "The judicial power shall extend to all cases, in law and equity, arising under this Constitution." Marbury v. Madison (1803) 5 U.S. 137, 174, 177 notes, "It cannot be presumed that any clause in the Constitution is intended to be without effect and . . . . It is emphatically the duty of the judicial department to say what the law is." While some Guaranty Clause claims have been found to be jurisdictionally insubstantial,

e.g. in Pacific Telephone Co. v. Oregon (1912) 223 U.S. 118 and Ohio ex rel. Davis v. Hildebrandt (1916) 241 U.S. 565, 570, in other cases Guaranty Clause claims have been adjudicated. See e.g. Forsyth v. Hammond (1897) 166 U.S 506, 519 and Minor v. Happersett (1874) 88 U.S. 162, 176-177. Davis v. Hildebrandt supra notes that even Guaranty Clause claims subject to dismissal "for want of jurisdiction" may often more properly be decided on the merits, "in view . . . of the subject-matter of the controversy and the Federal characteristics which inhere in it . . . ." Pacific Telephone v. Oregon supra at 150 goes even further, affirming the Court's "everpresent duty whenever it becomes necessary in a controversy properly submitted to enforce and uphold the applicable provisions of the Constitution as to each

and every exercise of governmental power."

In Baker v. Carr supra at 198 the Court notes that in instances where Guaranty Clause claims were not adjudicated under the "political question" doctrine the problem has been nonjusticiability, not absence of jurisdiction.

> "In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed, rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protections for the right asserted can be judicially molded."

In Baker at 210 the Court rules out any political question exclusion in Halliwell v. Eu, since "[it is] not the federal judiciary's relationship to the states which gives rise to the 'political question.'"

Also, in Reynolds v. Sims (1964) 377 U.S. 533, 582 the Court reaffirmed that only some Guaranty Clause claims are nonjusticiable:

> "As we stated in Baker v. Carr, some questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards."

Since Reynolds the Guaranty Clause has rarely been treated as a dead letter by any court. In Kohler v. Tugwell (1968) 292 F. Supp. 978, 985 the majority opinion notes:

> "The nature of the question, . . . not the mere invocation of the [Guaranty] Clause, determines whether a contention is justiciable and the Clause judicially enforceable . . . . [Whether] people were deprived of . . . the right to vote [meaningfully] on an amendment to their constitution [is] justiciable under the Guaranty Clause."

In Van Sickle v. Shanahan (1973) 511 P. 2d 223, 234 the Supreme Court of Kansas unanimously ruled:

> "[T]he contention all cases arising under the guaranty clause are non-justiciable has no historical precedent. Instead, as in other cases wherein the 'political' controversy bar to judicial enforcement has been raised, we must look to the facts [and] the theory upon which the constitutional challenge is premised to ascertain whether the issue may be resolved by the judicial process."

G. Future Consideration Restricted to One Person, One Vote Claims

Judge Karlton ruled that geographic inequality of representation was the only aspect of plaintiff's claims that would be allowed to be adjudicated. The order of July 1 notes:

> "[Plaintiff] has alleged . . . that if the plans are employed, his right to a full and equal vote will be compromised. On the basis of this claim, and this claim alone, the plaintiff must be allowed to proceed."

Not a single one of Judge Karlton's dismissals without leave to amend satisfies the strict standard applicable to

the exclusion of claims at the pleading stage.

> "Claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial." Goosby v. Osser (1973) 409 U.S. 512, 518.

However, Judge Karlton forced plaintiff to file a complaint shorn of the disputed aspects of his case as a condition for the convening of a three-judge court. The order of July 1 notes:

> "[T]he plaintiff is directed to file with the Court and serve on all defendants within thirty (30) days of the effective date of this order a new complaint. That pleading shall be denominated 'Second Amended Complaint,' and shall set forth a short and plain statement of those claims which are cognizable by this Court -- i.e., the claims based on the alleged violation of the plaintiff's voting rights protected by the 'one person, one vote' guarantees of the United States Constitution. The new complaint shall also contain a concise statement of the relief which the plaintiff seeks, the details of plaintiff's proposals

should not be included. Finally, the plaintiff is directed not to assert any claims that have been discussed in this order and dismissed without leave to amend. Upon filing and service of the plaintiff's Second Amended Complaint, the Court shall request that the Chief Judge of this Circuit convene a three-judge court pursuant to the procedure set out in 28 U.S.C. § 2284(b)."

V. Plaintiff's Appeal to the Ninth Circuit

A. Events Leading Up to Appeal

When Plaintiff filed a complaint limited to the one person, one vote aspects of his case on July 12, 1982 he simultaneously filed a petition for reconsideration by the three-judge panel of the restrictive terms imposed by Judge Karlton in his sua sponte dismissals without leave to amend. Plaintiff subsequently sought to determine from Judge Karlton's law clerk whether the dismissals without leave to amend had been docketed as a final judgment and whether the three-judge panel would be convened before any deadline for appeal. Judge Karlton's law clerk refused to clarify the appealability of the order of July 1, saying only that "the order speaks for itself." Judge Karlton's only response to Plaintiff's

efforts to secure procedural clarification was to permanently enjoin Plaintiff from communicating with any member of his staff. Such treatment nullifies well-settled Ninth Circuit policy: "[T]he Court itself undertakes to assure the [pro se] litigant that no meritorious case be lost because of a lack of legal skill. Briefs are scanned with unjaundiced eyes and technical compliance with the Rules of Court is not stringently enforced. The dominant theme is liberality." Hoffman v. United States, 244 F.2d 378, 379 (9th Cir. 1957).

After the severance of communications Plaintiff appealed to the Ninth Circuit against the exclusions imposed by Judge Karlton as "an invasion of the province of a three-judge court" contrary to Idlewild Bon Voyage Liquor

Corp. v. Epstein (1962) 370 U.S. 713, 715-716 and as a collateral order amounting to a final disposition of time-bound rights appealable under Brown Shoe Co. v. United States (1962) 370 U. S. 294, 306.

B. Refusal of District Court Panel to Adjudicate Issues Not Involved in Appeal to Ninth Circuit

After plaintiff went forward with his appeal regarding the portions of his case excluded from his amended complaint the three-judge panel met for the first time and refused to take action on the one person, one vote aspects of the case. This action was clearly contrary to Griggs v. Provident Consumer Discount Co. (1982) 103 S.Ct. 400, 402, since an appeal divests a lower court of jurisdiction only "over those aspects of the case involved in the appeal."

C. Obstruction of Appeal by Judges Wright and Hug

On September 28, 1982 Circuit Judges Wright and Hug issued an order dismissing plaintiff's appeal. This order, which made no reference at all to the issues being appealed, simply noted that Judge Karlton had allowed plaintiff to amend his complaint regarding a (small) portion of his claims. In its entirety the order of September 28 states:

> "This appeal is dismissed for lack of jurisdiction. An order dismissing a complaint, or part of a complaint, with leave to amend is not a final appealable order. See Scanlon v. Atascadero State Hospital, 667 F.2d 1271 (9th Cir. 1982)."

The order thus ignores the impact of delay on the vital political rights at stake in the case and even the fact that plaintiff was appealing dismissals without leave to amend. Such a mechan-

istic application of the rules of appealability is contrary to the policy established by the U.S. Supreme Court.

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." Hormel v. Helvering (1941) 312 U.S. 552, 557.

Moreover, Scanlon at 1272 held in circumstances similar to Halliwell v. Eu that "The order is applicable." Emphasis added.

On October 4, 1982 plaintiff requested immediate emergency reconsideration of the order of September 28. When two more weeks had passed without action on this reconsideration request plaintiff filed another petition to break the procedural logjam with a suggestion that it be heard initially by the Ninth Circuit en banc as provided for by Local Rule 13(e)(2).

On October 22 Judges Wright and Hug handed down another purely formalistic order with no reference whatever to the underlying realities of the case. The order cites Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975) in support of the notion that "dismissal with leave to amend in certain respect" is the equivalent of leave to amend for purposes of appealability. However, Scott reverses restrictions on leave to amend of the sort imposed by Judge Karlton:

> "Even where amendment is not a matter of right 'leave to amend shall be freely given when justice so requires.' Fed.R.Civ.P. 15(a) . . . [U]pon remand appellants should be allowed leave to amend. We therefore reverse the district court's dismissal of count three insofar as it denies leave to amend." Id. at 1116.

The order of October 22 also argued:

> "[T]he dismissal without leave to amend with respect to fewer than all claims was not appealable in the absence of entry of judgment

in accordance with Fed.R.Civ.P. 54(b)."

Since Judge Karlton had adamantly refused to clarify the finality of the aspects of his order of July 1, 1982 which plaintiff was then forced to appeal, the failure of the lower court to provide a Rule 54(b) certificate can hardly serve as grounds for allowing a lower court's action to stand unchallenged until the ongoing elections process had made an appeal meaningless. The United States Supreme Court has squarely affirmed that notwithstanding the absence of a Rule 54(b) certificate, the refusal of a lower court to adjudicate time-bound rights is a final disposition under the collateral order rule. In Moses H. Cone Memorial Hosp. v. Mercury Const. (1983) 103 S.Ct. 927, 935 the U.S. Supreme Court affirms that under the rule set forth in Cohen v.

Beneficial Loan Corp. (1949) 337 U.S. 541 orders which "conclusively determine the disputed question" by refusing to adjudicate it are final orders subject to interlocutory appeal:

> "An order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits. For the same reason, this order would be entirely unreviewable if not appealed now."

On October 26, 1982 Judges Wright and Hug took it upon themselves to deny plaintiff's petition for en banc consideration by the Ninth Circuit and refused to allow this petition to be sent to the active-service judges of the Ninth Circuit. This action they justified by treating the en banc petition as an appeal for reconsideration of the order of September 28, ignoring the effect of plaintiff's October 4 request for reconsideration

on the tolling of time and therefore ruling the en banc petition to be untimely. However, such a ruling is clearly contrary to established practice as noted by Wright & Miller in Federal Practice and Procedures § 3986 at 473 n. 8:

> "It is well established as to all types of cases -- state or federal, civil or criminal, appeals or certiorari cases -- that . . . if a timely rehearing petition is filed, that the prescribed period is tolled and starts anew upon the entry of an order denying rehearing or otherwise finally disposing of the appeal."

When plaintiff again sought to secure a ruling on his appeal which addressed the actual facts of Halliwell v. Eu, Judges Wright and Hug issued the following stinging rebuke:

> "Appellant's December 15, 1982 petition for reinstatement of this appeal is denied. In light of appellant's apparent unwillingness or inability to comprehend the limits on this court's jurisdiction noted in our prior orders, a de-

tailed explanation of the errors in appellant's latest petition would serve no useful purpose. We have considered appellant's contentions, however, and find them devoid of merit. The appeal has been dismissed, the mandate has been issued, and no further requests for reconsideration will be entertained. If appellant believes that review of this court's actions is necessary, his remedy lies in an application to the United States Supreme Court. Further attempts to obtain reconsideration by this court may result in the imposition of sanctions."

VI. District Court's Refusal to Adjudicate

A. Court's Refusal to Adjudicate Constitutionality of the Districts Prior to the 1982 General Election

Plaintiff continued to seek action by the District Court on the most important of the issues within the limitations of the order of July 1, the misnumbering of senate districts, while the Ninth Circuit considered his appeal of the exclusions imposed by that order. However, the District Court denied all requests for hearings until October 22, 1982; then, with only days left before the election, the Court conceded that it had never actually lost jurisdiction to consider plaintiff's requests.

When the Court finally did meet on October 27, insufficient time remained to adjudicate any of plaintiff's claims

on their merits before the November 2, 1982 election. At the hearing the Court even refused to rule on plaintiff's proposal to establish a pre-election standard for evaluating whether constitutional flaws in the contested districts changed election results. The Court met again on November 1, 1982 to consider plaintiff's proposal to embargo election results until an election-validation standard had been decided upon, then denied plaintiff's motion on the ground that a delay in counting ballots

> "would be likely to cause great confusion among the voters, the candidates, and the officials charged with carrying out [the election] process. Some, perhaps many, would-be voters may well abandon their plans to exercise their franchise."

B. New Districts Enacted While District Court Stalled

Because plaintiff was enjoined from communicating with Judge Karlton's staff all procedural arrangements with plaintiff have been handled by the law clerk of another member of the three-judge panel even though Judge Karlton retained operational control of proceedings. This arrangement led to an administrative snafu which made it impossible for plaintiff to secure any adjudication of the constitutionality of the 1982 districts before lame-duck Governor Jerry Brown called a special session at which those elected from the 1982 districts enacted a new redistricting plan to perpetuate themselves in office.

C. February 16, 1983 Hearing

Plaintiff was finally able to secure a hearing on February 16, 1983

on a proposal for special elections to remedy senate district misnumbering. The panel would not consider any challenge to the newly enacted districts at the February 16 hearing unless plaintiff moved to amend his complaint by January 7, 1983, but it was impossible to meet this deadline set by the panel in an order dated December 17, 1982 since Judge Karlton did not file the order until February 8, 1983 and plaintiff did not receive a copy of the order until February 11, 1983. The panel initially was willing to consider plaintiff's motion to shorten the terms of legislators elected in 1982 to one year as was done in Cosner v. Dalton (1981) 522 F.Supp. 350, but consideration of this motion was postponed by the panel because the Assembly failed to respond to this motion due to "a failure in communication."

D. Court's Refusal to Rule on Misnumbering of Senate Districts

Two months after the February 16, 1983 hearing the panel handed down an order wherein its refusal to rule on the misnumbering issue was justified on account of

> "problems that appear to implicate fundamental constitutional doctrines and that also appear never to have been presented squarely to another federal court. These problems are sufficiently novel, subtle, and grave as to demand the most careful and thorough consideration by the Court."

The order of April 19, 1983 does acknowledge:

> "On the other hand, both the nature of this specific case and the language of the statute empowering this Court to act (see 28 U.S.C. § 2284) compel the Court to dispose of the motions with dispatch. In an attempt to reconcile these contrary imperatives, the Court will summarily dispose of those matters which permit of such treatment and will take under advisement the balance of the matters tendered."

E. Dismissal Motion of Secretary of State

The order of April 19 denies a motion by the Secretary of State to withdraw from the case:

> "Defendant March Fong Eu is sued herein in her capacity as California's Secretary of State. She has maintained throughout the course of this litigation that she is not the proper party defendant to an action challenging the apportionment of state electoral districts. . . . The Secretary does not suggest that there is a principled distinction to be drawn where, as in this suit, the challenge is immediately directed against a plan adopted by the state's highest court, rather than by the state legislature. Accordingly, the motion to dismiss is denied."

F. Congressional Delegation Joinder Motion

At the status conference where arrangements were made for the February 16, 1983 hearing, Judge Karlton had invited the Assembly to bring a motion to

dismiss the congressional aspect of the case unless plaintiff joined all 45 California congressmen as defendants. This motion was denied by the full panel in the order of April 19:

> "At the express invitation of the court, counsel for the defendant in intervention Assembly has brought on a motion to dismiss the plaintiff's claims regarding the drawing of congressional districts. The basis for the motion is that the plaintiff has failed to join parties indispensable to the action under Fed.R.Civ.P. 19, i.e. the members of California's congressional delegation. Despite counsel's splendid exegesis on Rule 19, the Court concludes that this motion must be denied. In the final analysis, the Court must acknowledge the apparent fact that no action challenging the apportionment of electoral districts has ever been dismissed on this ground. Indeed, counsel conceded the novelty of this attack at oral argument."

G. Denial of Plaintiff's Recusal Motion

The order of April 19 also denied two procedural motions put forward by plaintiff. The first of these sought

recusal of Judge Karlton from operational control of proceedings on the grounds of his refusal to honor the expedited consideration requirement of 28 U.S.C. § 2284 and his refusal to allow plaintiff to communicate with his law clerk even though he allowed counsel for defendants to do so. In denying the motion the order of April 19 notes:

> "The plaintiff has moved to recuse the Honorable Lawrence K. Karlton, to whom this case was initially assigned, from exercising what he terms 'operational control' of this action. The Court assumes that by 'operational control' the plaintiff means the authority conferred by 28 U.S.C. § 2284(b)(3). . . . First, the bias or prejudice upon which a motion to recuse must be based must be extrajudicial and cannot rest upon trial rulings or conduct (citations). Thus the plaintiff's displeasure with Judge Karlton's rulings does not provide a basis for his motion, even if those rulings were legally erroneous. . . . Finally, the refusal of Judge Karlton to permit the plaintiff to engage in frequent and prolonged telephone conversations does not warrant Judge Karlton's disqualification. The law clerk is the

> judge's employee and his obligation is to the judge for whom he is employed."

The order recognizes that plaintiff's motion is brought under 28 U.S.C. §2284 (b)(3): "Any action of a single judge may be reviewed by the full court at any time before final judgment"; but the Court applies a standard that would be appropriate only for a 28 U.S.C. § 144 motion to disqualify a judge from all participation in a case. Moreover, plaintiff did not protest any limitation on the frequency or duration of calls to Judge Karlton's law clerk such as Judge Karlton apparently persuaded his colleagues he had imposed; plaintiff in fact protested the total ban on communication which had hampered plaintiff's conduct of his case since August 9, 1982.

H. Denial of Plaintiff's Motion for Reconsideration

More than nine months after plaintiff sought reconsideration by the full panel of Judge Karlton's dismissals without leave to amend, such reconsideration was granted by this order. But the order completely avoids any evaluation of Judge Karlton's rulings in the light of appropriate legal standards just as it avoids discussing Judge Karlton's procedural conduct. The order simply says,

> "Upon reconsideration, the Court determines to reaffirm Judge Karlton's holdings, essentially for the reasons stated in the July 1 order."

While the order does not attempt to demonstrate that Supreme Court decisions "inescapably render frivolous" any of plaintiff's claims, it does include some discussion of the two aspects of the

case where decisions of the Supreme Court are least definitive. In support of the nonjusticiability of partisan gerrymandering the order alleges that

> "[F]our Justices of the Supreme Court recently rejected the principle that discrimination against political groups in the context of electoral representation is sufficient to raise an Equal Protection claim. City of Mobile [v. Bolden], 446 U.S. at [76-]79 . . . ."

However, the cited passage bears no such interpretation, as it draws a sharp distinction between disproportionate representation and discrimination against groups.

> "It is for the states 'to determine the conditions under which the right of suffrage may be exercised . . . absent of course the discrimination which the Constitution condemns.' [Citation.]" 446 U.S. at 76-77.

The order goes on to assert that the political bias which plaintiff alleges was the real reason for the California Supreme Court's selection of

redistricting plans is in fact constitutionally acceptable:

> "[T]he Court accepts the fact that where the apportionment process is committed to a political body, the process will likely be colored by partisan considerations. Partisan politics cannot properly be viewed as a taint on an otherwise pure system of self-governance. On the contrary, our political system is by design a continuing struggle between powerful political adversaries: in short, it is essentially partisan in character. The courts have not been delegated the role of referees to ensure that the immediately dominant party does not press its advantage to the full, if it does so in an otherwise lawful manner."

The order seeks to justify dismissal of plaintiff's Guaranty Clause claims as follows:

> "Even commentators calling for sweeping judicial intervention in state affairs on the basis of the Guaranty Clause, however, concede that the law does not presently permit the adjudication of 'claims that the structure of public decisionmaking should be altered to conform it to some concept of republicanism.' Note, A Niche for the Guarantee Clause, 94 Harv.L. Rev. 681, 687 (1981). It is just

> such claims that the plaintiff seeks to litigate in this case."

In fact plaintiff's invocation of the Guaranty Clause is as "the last line of defense for the rule of law" against actions by the California Supreme Court which have sought "to alter the structure of public decisionmaking," e.g., by abrogating the referendum stay provisions of the California Constitution on the grounds that 5% of the California electorate should not have this power and that $12 million is too high a price for permitting a special election so the majority can be allowed to work its will.

VII. Year-Long Hibernation by District Court

The order of April 19, 1983 also provided for a briefing schedule on plaintiff's motion for interim special elections on November 8, 1983 and on an Assembly motion for summary judgment. However, after this briefing was completed several months passed without any action by the Court on either the new or long-pending motions.

A. Plaintiff's Supplemental Pleading Regarding 1983 Redistricting Plans

In August 1983 plaintiff sought to facilitate prompt consideration of motions related to his original grievances which were perpetuated in the 1983 redistricting plans by means of a supplemental pleading demonstrating that the 1983 districts were essentially unchanged from their 1981 versions. The

action was by then one-and-a-half years old, but defendants had as yet filed no responsive pleading -- only Rule 12(b) dismissal motions -- so plaintiff was entitled to unilaterally amend his complaint at this time; see Brier v. Northern California Bowling Proprietors' Ass'n (1963) 316 F.2d 787, 789.

B. Plaintiff's Unsuccessful Effort to Expedite Consideration

When the Court had continued its hibernation for several more months plaintiff protested on November 1, 1983, "[T]he time is fast approaching when deadlines relating to the 1984 elections will require consideration of new motions whether decisions on the February 16, 1983 motions have been reached or not."

On December 6, 1983, after the Court's inaction had continued for another month, plaintiff filed a revised

proposal for interim special elections:

> "Since November 8, 1983 has passed into history it is impossible to hold interim special elections on that date as proposed in plaintiff's motion of January 6, 1983. However, it is possible to salvage some vestige of constitutional government by holding special elections for the remainder of the terms of congressmen and state legislators elected in 1982 from the flagrantly gerrymandered districts imposed by the California Supreme Court in clear violation of the State and Federal Constitutions. . . . If turnout in the runoff election is to be maximized a special election should be called no later than March 19, 1984, with the first round of voting on May 8, 1984 and the runoff in districts where no candidate receives a majority on May 8 to be held concurrently with the presidential primary on June 5, 1984."

Plaintiff also filed notice of motions for a series of proposals for injunctive relief relating to various aspects of the districts slated for use in the 1984 elections, along with the following protest:

> "One may deduce from the long delay in ruling on plaintiff's pending motions that this Court

> has little enthusiasm for dealing with these motions. Even so, this Court has no right to destroy plaintiff's right to a meaningful appeal by such prolonged inaction on these motions. It is likewise essential to preservation of plaintiff's right to appeal that this Court promptly establish a briefing schedule for the new motions brought forward in this brief."

C. Court's Denial of Plaintiff's Request for a Status Conference

On January 15, 1984, after another month without action by the Court, plaintiff filed a thorough documentation of the "run-out-the-clock" tactics which had delayed proceedings to that point along with the following plea:

> "PLAINTIFF URGENTLY REQUESTS THAT A STATUS CONFERENCE BE HELD AT THE EARLIEST POSSIBLE DATE TO EXPEDITE PROCEEDINGS IN THE CASE. TIME IS RUNNING OUT FOR PROVIDING EFFECTIVE RELIEF AFFECTING THE 1984 ELECTIONS."

On February 1, 1984 the panel denied plaintiff's request for a status conference, noting: "The undersigned judges currently have under advisement

[motions enumerated]. In light of these pending motions it would be ill-advised to hold a status conference at this time."

VIII. Motions Arising from Panel's Order of March 27, 1984

A. Joinder of California Supreme Court

Shortly after defense counsel argued in a May 3, 1982 dismissal motion that "it is the equitable and judicial action of the California Supreme Court which plaintiff seeks this Court to enjoin, and naught else," plaintiff had formally joined the California Supreme Court per Chief Justice Rose Bird as defendant in order to forestall a dismissal motion for failure to join an indispensable party. On November 1, 1983 plaintiff notified Chief Justice Bird:

> "On May 17, 1982 a formal summons and complaint in the action Halliwell v. Eu CIV.S. 82-147-LKK were served on the California Supreme Court pursuant to the provisions of California Code of Civil Procedure § 415.20. See 3 Record 163, 220 in the enclosed complete record of proceedings. At the time

> of this service any mandatory response was waived, the purpose being to ensure that the Court and every member of it were fully informed of the nature of plaintiff's federal suit. . . . Because the California Supreme Court's nullification of powers reserved by the people unto themselves has been so aggravated by the Court's action in Legislature v. Deukmejian plaintiff now believes that some response to his lawsuit by the California Supreme Court is essential. This is all the more so because none of the other defendants in Halliwell v. Eu has contested plaintiff's allegations concerning the California Supreme Court."

On January 12, 1984 counsel for the California Supreme Court challenged the Court's status as a party in Halliwell v. Eu. On January 17, 1984 plaintiff filed a response noting the adequacy of service and the need for joinder of the California Supreme Court. When the District Court ended its year-long hibernation on March 27, 1984 it ruled that the California Supreme Court is not a party to this action because plain-

tiff's inclusive complaint served on the California Court "bears a passing resemblance to a complaint, though it can hardly be characterized as a short and plain statement of the facts entitling the pleader to relief" and "plaintiff did not obtain leave of Court to make the California Supreme Court a party." Within a week of learning that the panel did not feel that these defects were "harmless errors" plaintiff filed a noticed motion for joinder of the California Supreme Court.

B. Amendment of Plaintiff's Complaint

The order of March 27 also refused to recognize the validity of plaintiff's motions seeking adjudication of his original constitutional grievances which were perpetuated in the 1983 redistricting plans. The order states:

> "The Court likewise declines to take cognizance of the plaintiff's motions that seek an adjudication of the districts created by the 1983 redistricting plan. The plaintiff's complaint does not raise any issue, factual or legal, regarding the 1983 redistricting plans."

This position is contrary to established practice. Wright & Miller note that the status of a case is not affected by "passage of new legislation that does not satisfy the principles urged in attacking old legislation." Federal Practice and Procedures § 3533 at 278. Pouring old wine into new bottles is of no significance in an apportionment case. It is the characteristics of the districts which are important.

Moreover, plaintiff preceded his motions relating to the 1983 redistricting plans with a supplemental pleading documenting the perpetuated flaws in the new districts. Many months after plaintiff's supplemental pleading was

filed, the order of March 27 refused to take cognizance of it on the ground that because of the inclusive complaint which plaintiff filed on March 11, 1982 (as evidence of his effort to expedite intervention by interested parties) "thereafter the plaintiff could not unilaterally amend or supplement his complaint, as he apparently attempted to do." The complaint of March 11, 1982 actually constituted a memorandum of points and authorities in support of plaintiff's original complaint and did not change the scope of the claims set forth in the original complaint. Not only did the March 11 complaint not amend plaintiff's cause of action, the order of July 1, 1982 (at 14) ruled that the document did not constitute a complaint at all within "the letter and spirit of Rule 8." The order of March 27 does not explain how the same docu-

ment may not constitute a complaint within the meaning of Rule 8 and thereby invalidate service on the California Supreme Court yet constitute a complaint within the meaning of Rule 15 so as to exhaust plaintiff's right to amend his complaint prior to filing of a responsive pleading.

Nevertheless plaintiff filed a noticed motion for leave to amend his complaint on April 7, 1984 along with his motion for joinder of the California Supreme Court.

C. Reconsideration of Dismissal of State Legislative Claims

The order of March 27 makes no effort to evaluate the factual disputes regarding the contested Assembly districts but instead grants the Assembly's motion for summary judgment on the following basis:

"The plaintiff vigorously

> disputes the figures proffered by the Assembly, but not in any legally cognizable way. The United States Court of Appeals for the Ninth Circuit has repeatedly held that a party opposing another's motion for summary judgment must counter the moving party's affidavits or declarations with affidavits or declarations of his own and failure to do so will result in granting of the motion. [Citations.]"

In fact plaintiff had relied on affidavits from Assembly v. Deukmejian and filed for verification purposes in Halliwell v. Eu and on portions of the Assembly's own affidavits to support his version of the facts.

The order of March 27 dismisses plaintiff's claim based on systematically underpopulated Democratic senate districts and systematically overpopulated Republican senate districts on the following basis: "There is no authority for the proposition that a reapportionment plan that discriminates on the

basis of political party offends the Equal Protection Clause." However, in Roman v. Sincock (1964) 377 U.S. 695, 710 the U.S. Supreme Court ruled: "[Any] minor inequality in representation [must be] free from any taint of arbitrariness or discrimination." Also, in refusing to recognize as unconstitutional systematic population disparities which discriminate against a political party the order of March 27 also contradicts the position taken by the panel on this point when it affirmed Judge Karlton's order of July 1, 1982 on April 19, 1983. In his order of July 1 Judge Karlton notes:

> "I do not mean to suggest that the alleged distortion of election districts to serve political ends is irrelevant to the question of whether deviations from absolute population equality are justifiable under the standards set out in Wesberry v. Sanders, 376 U.S. 1 (1964) and Mahan v. Howell, 410 U.S. 315 (1973)."

These incompatibilities between the case record and the disposition of plaintiff's assembly and senate claims by the order of March 27 were pointed out by plaintiff in a noticed motion seeking reconsideration of that order.

D. Revised Proposal to Remedy Senate District Misnumbering

In spite of more than a year of "careful and thorough consideration" of the issue of senate district misnumbering the Court declines to rule on the merits of this aspect of the case in the order of March 27; it notes:

> "[E]ven if [plaintiff] were to . . . convince us of the correctness of his vote acceleration and deferral theory, the Court would in the exercise of its equitable power deny him the relief he seeks. New, state-wide elections would simply be too drastic a remedy for the hypothetical problem which time alone will very shortly resolve."

In response to this, plaintiff filed a noticed motion in behalf of a revised

proposal for injunctive relief dealing with aspects of the misnumbering situation which will not be resolved for another 2-4 years.

E. Consideration of Plaintiff's Congressional Claims

Since none of the defendants had responded to plaintiff's congressional claims the Court could find no basis for dismissing this aspect of the case. The order of March 27 at long last called for briefing on plaintiff's pending congressional motion and also invited defendant to file a dismissal motion directed at the congressional aspect of plaintiff's complaint. Plaintiff filed his answer to defendant's dismissal motion, but defendant "inadvertently" failed to respond to plaintiff's motion and continues to refuse to do so.

F. Briefing on Plaintiff's Motions

Plaintiff directed all of his motions relating to the order of March 27 to the full panel inasmuch as the order of July 1, 1982 provided that "all further proceedings in this case shall be presided over by a three-judge court" and the only exception to this made by the full panel applied to conduct of a December 6, 1982 status conference. A court clerk subsequently decided that some of these motions involved matters properly heard and decided by a single judge and placed them on the calendar of Judge Karlton on his law and motion day. On June 25, 1984 the panel ruled that the motions slated for Judge Karlton's law and motion day should be considered by the full panel and established a briefing schedule for them. The panel also ruled that other motions relating to joinder of the California Supreme

Court and leave to amend may properly be considered by a single judge and required plaintiff to calendar them for consideration on Judge Karlton's regularly scheduled law and motion day. Briefing on all motions arising from the order of March 27, 1984 was completed in August 1984.

IX. Issues Involved in Motion Re Order of March 27, 1984

A. Objections to Joinder by California Supreme Court

Counsel for the California Supreme Court in opposing joinder cited Brown v. Supreme Court of Nevada (D.Nev. 1979) 476 F.Supp. 86, 89 as holding:

> "A state supreme court is not a 'person' within the meaning of 42 United States Code Section 1983, and thus, as an agency of the state, is immune from suit under both the Eleventh Amendment and 42 United States Code Section 1983."

But the Brown opinion also notes:

> "However, plaintiff may bring an action for prospective injunctive relief against officials of the state; such an action violates neither the Eleventh Amendment nor 42 U.S.C. § 1983. . . . Plaintiff shall name the individual justices of the Nevada Supreme Court only, and shall sue for injunctive relief only based upon the theory of denial of due process in violation of the Fourteenth Amendment to the United States Constitution." Id. at 89-90.

Counsel for the California Supreme Court

also relies upon Pennhurst State School and Hospital v. Halderman (1984) 104 S. Ct. 900, 908:

> "It is clear, of course, that in the absence of consent a suit in which a state or one of its agencies or departments is named as a defendant is proscribed by the Eleventh Amendment."

However, the Pennhurst opinion continues,

> "The Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the state." 104 S.Ct. at 909.

B. Assembly's Objections to Reconsideration

The crux of plaintiff's request for reconsideration of the summary judgment granted to the Assembly consisted of a detailed verification of an affidavit by Dr. Anthony Quinn. It is demonstrated that officially approved corrections to the A.B. 300 districts left unaffected the 18.92% maximum population disparity

noted by Dr. Quinn and that after correcting typographical and other textually demonstrable errors in A.B. 300 the maximum population disparity is reduced only to 10.07%, very close to the 10.11% found by Dr. Quinn. The Assembly's response to this was that "[P]laintiff's tedious analysis of the Quinn affidavit and his argument that the corrections to the 1982 districts were not authorized are irrelevant." According to the Assembly, the only relevant populations are those estimated by the Assembly for a version of the districts for which the Assembly has refused to provide maps or population source data.

In its opposition to reconsideration the Assembly also contends:

> "In considering Mr. Halliwell's motion to vacate, however, one should bear in mend that his attack on the 1981 districts gives new meaning to the word irrelevant. Those districts were used in 1982. Entirely different districts are

> now in place and have already been used in the 1984 primary."

However, plaintiff has demonstrated that the average assembly district is 92% unchanged from the previous district with the same number. Fifty-seven of eighty districts have only trivial changes or no changes at all. In every instance significant modifications have only served to make the district more secure for the incumbent elected in 1982. Thus the Assembly's claim gives new meaning to the phrase, "entirely different."

C. Senate's Opposition to Reconsideration

The Senate's opposition to reconsideration makes no attempt to support the legal reasoning of the order of March 27, 1984. Instead the Senate argues:

> "In ruling that plaintiff had not, and could not, assert claims upon which relief could be granted with regard to the court-ordered

> reapportionment of California's Senate Districts, this Court noted that the reapportionment plan ordered into effect by the California Supreme Court and challenged by plaintiff has been superseded by a subsequent reapportionment statute enacted by the Legislature and signed into law by the Governor. (Order of March 27, at 8:6-12, 12:23-25.) The Court thus found that even had plaintiff been able to identify constitutional defects in the court-ordered reapportionment plan, prospective relief designed to remedy such defects would be unnecessary and perhaps even counter-productive since the districts implemented by the California Supreme Court would soon be phased out of existence and replaced by the districts as constructed by the subsequently enacted reapportionment plan. . . . Indeed, the fact that four months have passed since the entry of the Order of March 27 serves only to bolster the strength of the analysis employed by the Court since the state is now much closer to the date upon which the court-constructed Senate Districts will have been completely phased out of existence and replaced by the legislatively enacted Senate Districts, the constitutionality of which is not before this Court."

Such a line of reasoning is contrary to established practice as noted by Wright & Miller in Federal Practice

and Procedures § 3533:

> "Passage of new legislation that does not satisfy the principles urged in attacking old legislation similarly does not moot the attack. . . . Any other conclusion would have created a superb method for resistant Legislatures to avoid Supreme Court review." Id. at 278-279.

> "Challenges to election requirements have frequently been determined after the passage of the election immediately involved in the initial litigation." Id. at 288-289.

Moreover, only half the term of senators elected in 1982 has transpired. If a vacancy should occur because one of the senators elected in 1982 dies or resigns, a special election will be held in the same district as was used for the 1982 election. In Firefighters Local Union No. 1784 v. Stotts (1984) 104 S. Ct. 2576, 2584 the U.S. Supreme Court affirms:

> "As long as the parties have a concrete interest in the outcome of the litigation, the case is

> not moot notwithstanding the size of the dispute. Powell v. McCormack 395 U.S. 486, 496-498 (1969)."

Even if there were no possibility of special elections due to vacancies and term-shortening were judged to be unduly disruptive the challenge to the 1982 districts adopted in Assembly v. Deukmejian would not be moot. In Democratic Party of the United States v. Wisconsin (1981) 450 U.S. 107, 115 n. 13 the opinion notes:

> "This case is not moot. The Wisconsin Supreme Court's order is not explicitly limited to the 1980 convention. The effect of the order 'remains and controls future elections.' Moore v. Ogilvie, 394 U.S. 814. In any event, even if the order were clearly limited to the 1980 election year, the controversy would be properly before us as one 'capable of repetition, yet evading review.' Rosario v. Rockefeller, 410 U.S. 752, 756 n. 5; Dunn v. Blumstein, 405 U.S. 330, 333 n. 2." Emphasis added.

D. Senate's Refusal to Argue Merits of Plaintiff's Revised Remedial Proposal Regarding Senate District Misnumbering

The Senate does not attempt to demonstrate any defect in plaintiff's revised proposal for injunctive relief from the continuing effects of senate district misnumbering. Instead the Senate argues that the District Court lacks jurisdiction on account of plaintiff's appeal of the District Court's refusal to hold special elections concurrent with the June 5, 1984 primary election (which plaintiff was unable to pursue because the court reporter failed to prepare a transcript of the February 16, 1983 hearing on senate district misnumbering before June 5, 1984 had passed into history). The Senate argues:

> "What plaintiff has neglected to bring to this Court's attention is the fact that (1) a prior applica-

> tion for provisional relief, based on the identical claim of 'misnumbering' and seeking virtually the identical relief, was rejected by this Court's Order of March 27, 1984; and (2) subsequent to the entry of that Order, he filed a notice of appeal, pursuant to 28 U.S.C. § 1253, seeking review of the denial of the application for injunctive relief in the United States Supreme Court. As a result of plaintiff's appeal, this Court has been deprived of the jurisdiction to even consider plaintiff's renewed request for injunctive relief."

There is a close similarity between plaintiff's present motion calling for special elections in certain senate districts and plaintiff's prior motion, which would have scheduled special elections so that runoffs would coincide with the June primary election. However, plaintiff's motion of June 20, 1984 in most instances seeks special elections in the appropriate 1982 districts, while the prior version of plaintiff's motion proposed revised districts for use in special elections.

Moreover, the District Court has insisted that when the relief originally requested has been mooted by the passage of time a fresh motion seeking a revised remedy is necessary. See Transcript of December 6, 1982 status conference at 15. Indeed, the Assembly insisted on October 29, 1982 ~~that a proposal for~~ injunctive relief similar to that rejected by the District Court on October 27, 1982 be also submitted to the District Court before the proposal could serve as a proper vehicle for an appeal: the Assembly argues,

> "[Plaintiff] proposes that the elections be held but the results not announced. This latter request was not even presented to the District Court and is therefore not appropriate for review in the United States Supreme Court, Rule 44.4."

E. Defendant's Objections to Amendment of Plaintiff's Complaint

None of the defendants has been able to cite any unfair burden which would arise from plaintiff's proposed amendment of his complaint which would justify making an exception to the established liberal policy favoring leave to amend.

The Assembly argues:

> "In responding to Mr. Halliwell's filings, the defendants have focused, as the scope of the Second Amended Complaint requires, on the 1982 plans. To permit the plaintiff to now add a challenge to the 1983 plans, as well as claims long-ago dismissed without leave to amend, will result in prejudice to the defendants by forcing them to defend at this late stage a set of plans not previously at issue in this litigation. The prejudice to the defendants will take various forms. First, a new discovery will be required with respect to a new set of legislative and congressional districts. . . . Second, defendant will be forced to undergo successive waves of pleadings from Mr. Halliwell con-

> cerning the 1983 districts, all requiring responses. The plaintiff's newly asserted claim is that 'any present or future districts which perpetuate the constitutional flaws in (the 1982) districts' will be constitutionally flawed. . . . Finally, to the extent that plaintiff's proposed new complaint seeks to restate claims long ago and repeatedly rejected by the Court, granting his motion will force defendants to bring again a whole new series of dispositive motions addressed to the old claims in the new complaint. The resulting prejudice to defendants is obvious."

The notion that public disclosure of the details of a redistricting plan represents an undue burden constitutes the height of legislative arrogance. The Assembly has totally stonewalled plaintiff's requests for maps and population data for the 1981 version of the contested Assembly districts. The possibility that the Assembly may be forced to divulge this data for the 1983 plans hardly constitutes grounds for denial of leave to amend. There will be no "suc-

cessive waves of pleadings" unless the Legislature replaces the 1983 plans with successive waves of new districts as a means of perpetuating constitutional flaws in the existing districts. Plaintiff is certainly entitled to invoke U.S. Supreme Court decisions since July 1, 1982 in support of his claims even if this requires defendants to file motions challenging the applicability of these cases. Relevant recent U.S. Supreme Court decisions include: Anderson v. Celebrezze (1983) 103 S.Ct. 1564, 1573 (standing); City of Revere v. Massachusetts General Hospital (1983) 103 S.Ct. 2979, 2983 (standing); Karcher v. Daggett (1983) 103 S.Ct. 2653, 2863, 2869, 2671 (partisan gerrymandering); Michigan v. Long (1983) 103 S.Ct. 3469, 3477 (independent state grounds); and Schmidt v. Oakland Unified School District (1982) 73 L.Ed. 2d 245, 246-247 (pendent

jurisdiction).

The Senate argues:

> "It is respectfully submitted that allowing plaintiff to continue his one-man campaign of harassment against the California Legislature would be extremely prejudicial. If the past history of this litigation is any guide, allowing plaintiff to supplement his pleading will serve only to trigger round after round of baseless motions and frivolous discovery requests which will result in the unnecessary expenditure of countless taxpayer dollars on behalf of the defendant and the intervening parties as well as a waste of judicial resources at every level of the federal judicial system. For this reason, this Court should now put an end to plaintiff's litigiousness by denying the instant motion."

In fact the main reason why this litigation has not been adjudicated in accordance with the expedited consideration requirements of 28 U.S.C. § 2284 has been the adamant refusal of the Senate to disclose <u>any</u> information on <u>any</u> aspect of its redistricting plan. The Senate has insisted that the with-

held information is protected by legislative privilege, separation of powers doctrine and work product privilege. The Senate's evasive tactics which have stymied adjudication of the aspect of the case to which the District Court has devoted most of its effort are flatly illegal under United States v. Nixon (1974) 418 U.S. 683.

The Secretary of State argues:

> "Filing of further motions by plaintiff and necessary motions by defendants would certainly not usefully illuminate the issues, but would most certainly be duplicative and burdensome. In addition further discovery would be required regarding claims against the validity of 1984 district lines. And raising the same issues regarding a whole new set of district lines after two years of poring over the first set of lines and 1-1/2 years after adoption of the new lines would require a major shifting of analysis and research efforts at best."

The Legislature continues to refuse to provide supposedly public information on the new districts even though plain-

tiff requested this information on February 16, 1983 and has repeatedly renewed this request. Although the Secretary of State claims plaintiff should have instituted discovery regarding the 1984 districts she has refused to divulge even the information regarding these districts which is relevant to plaintiff's 1982 claims on the ground that this discovery request seeks information outside the scope of plaintiff's complaint. This refusal to provide data is a clear violation of Oppenheimer Fund Inc. v. Sanders (1978) 437 U.S. 340, 351:

> "Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues."

The alleged burden of shifting of analysis and research efforts is also a "straw man," as the Legislature is

intimately familiar with every aspect of its redistricting plans. The reason why it has been claimed that compilation of factual information would be burdensome is that disclosure of this information would clearly demonstrate grave constitutional flaws in the contested districts.

X. Judge Karlton's Order of April 4, 1985

On April 4, 1985 Judge Karlton issued the following order:

> "Good cause appearing therefor, the Court denies [Plaintiff's] motion to join the [California] Supreme Court. No claim is or can be stated against the Supreme Court with respect to the issues in this case. [Continued in footnote: To the degree the Plaintiff seeks to amend or supplement his complaint, the motion is also DENIED, as the amendments or supplementations add nothing to the claims already rejected by the Court in previous motions.] IT IS SO ORDERED. [Continued in footnote: The motions to dismiss the claims relative to the redistricting plan will be disposed of by the three-judge court in due course.]"

The order of April 4, 1985 appears to assume that Plaintiff's only claim against the California Supreme Court is the Due Process claim which already had been rejected by the order of July 1, 1982. In fact Plaintiff's most important claim against the California Supreme Court is based on excessive popu-

lation disparities among districts, as Plaintiff's complaint clearly notes:

> "The opinion of the Court in Assembly v. Deukmejian is remarkable in that, even though the accuracy of population figures supplied by proponents was vigorously disputed, there is no mention whatever of the populations of the congressional districts which the Court ordered into effect. Article I § 2 of the United States Constitution requires virtual population equality in congressional districts (Kirkpatrick v. Preisler (1969) 394 U.S. 525), and in every other case where a court has ordered its own congressional redistricting plan or selected a plan from among those submitted to it the court has felt obligated to discuss compliance with this important federal requirement."

The pivotal importance to Halliwell v. Eu of the California Supreme Court's handling of the issue of district populations is acknowledged by the order of November 1, 1982:

> "[T]he Court notes that the challenged plan was adopted for this election only by the California Supreme Court, and that in doing so that court concluded that it was far and away the most satisfactory plan available in terms of

> compliance with the one person, one vote mandate. Assembly v. Deukmejian, 30 Cal.3d at 674. At least at this stage in the proceedings, we must give some deference to the finding of the California Supreme Court. Thus we cannot say that the Plaintiff now enjoys a substantial chance of succeeding on the merits of his challenge to the congressional plan."

The California Supreme Court, the state agency on whose authority the contested districts were adopted, is clearly an appropriate defendant in any action challenging these districts. This is especially so since Plaintiff alleges that the adoption of the contested districts was a deliberate act of invidious discrimination. The Court recognized this at the February 16, 1983 hearing, where the following exchange took place:

> "[SENATE COUNSEL]: Mr. Halliwell has not alleged arbitrary, capricious or purposeful discrimination on the part of the California Supreme Court . . . ."
>
> "JUDGE RAMIREZ: I disagree

> with you. He has alleged that the Supreme Court has acted in an invidious type manner. . . . [H]e has alleged that the Supreme Court had several plans before it and yet it chose that specific plan that multiplied the distortion of [inequality in] representation. That's what I read Mr. Halliwell to say. The Supreme Court willfully and intentionally had before it various plans. It ignored the most reasonalbe plan and took that plan that magnified this distortion."
>
> "JUDGE KARLTON: That's what he says."

The notion that any state agency which commits a civil rights violation is immune from federal judicial proceedings is squarely rejected by the U.S. Supreme Court in Pulliam v. Allen (1984) 80 L. Ed. 2d 565, where the majority opinion even affirms that a state judge may be liable for Plaintiff's costs in a civil action.

The footnote denying leave to amend which Judge Karlton tacks onto a proposed order (lodged on August 31, 1984) dealing with an entirely separate motion

is simply incorrect in its contention that Plaintiff's attempt to supplement his complaint involved only issues "already raised in prior pleadings and disposed of by the Court." This perfunctory one-sentence treatment of Plaintiff's motion ignores the whole issue of the 1983 districts which was the principle reason for the seven-month delay in ruling on the motion. The order also ignores Supreme Court decisions subsequent to the Court's previous rejections of some of Plaintiff's claims which support the revised version of these claims. These recent U.S. Supreme Court decisions include Schmidt v. Oakland Unified School District (1982) 73 L.Ed. 2d 245, Karcher v. Daggett (1983) 103 S.Ct. 2653, and City of Revere v. Massachusetts General Hospital (1983) 103 S.Ct. 2979.

Current Status

On April 8, 1985 Plaintiff filed a motion to compel responses to formal inquiries relating to the motions denied by Judge Karlton on April 4, 1985. Plaintiff did this in order to clarify some pivotal factual issues prior to appealing Judge Karlton's order to the full three-judge court pursuant to 28 U.S.C. § 2284(b)(3). This motion was heard on May 23, 1985 by Magistrate Esther Mix, who indicated that she would not compel discovery from the Senate and the Assembly while Plaintiff's motion for reconsideration of the order of March 27, 1984 was pending before the three-judge court. Plaintiff has submitted a revised motion seeking specific objections to his inquiries from the Senate and Assembly, and this is to be heard on July 25, 1985. Pursuant to a postponement requested by the Secretary

of State (and agreed to by Plaintiff and Magistrate Mix), consideration of Plaintiff's motion to compel more specific responses to his inquiries by the Secretary of State also will be heard on July 25, 1985.

Respectfully submitted,

/s/ MICHAEL J. HALLIWELL

Michael J. Halliwell
Plaintiff
In Propria Persona

Dated: June 29, 1985

PROOF OF SERVICE BY MAIL

I, Betty Halliwell, am a citizen of the United States and am self employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My home address is that of 2930 Colorado Avenue #D-18, Santa Monica, California.

On June 29, 1985 I served the attached case history via first-class mail with postage fully prepaid at Santa Monica, California on the attorneys of record for defendants March Fong Eu, Secretary of State of Califoria; Chief Justice Rose E. Bird; intervenors, Assembly and Senate of California; and the member of the three-judge panel and Clerk of the Court:

Chief Justice Rose E. Bird
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Deputy Atty. General Carol Hunter
1515 K Street, Suite 511
Sacramento, CA 95814

The Hon. Lawrence K. Karlton
Chief Judge, Eastern Calif. District
U.S. District Court
650 Capitol Mall
Sacramento, CA 95814

The Hon. Raul A. Ramirez
District Judge, Eastern Calif. District
U.S. District Court
650 Capitol Mall
Sacramento, CA 95814

The Hon. Anthony M. Kennedy
Circuit Judge
Ninth Circuit Court of Appeals
555 Capitol Mall, Suite 1400
Sacramento, CA 95814

Clerk, U.S. District Court
650 Capitol Mall
Sacramento, CA 95814

Anthony L. Miller, Chief Counsel
Richard S. Nishite, Staff Counsel
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Conrad G. Tuohey and Teresa M. Ferguson
Tuohey & Prasse
1200 N. Main St., Suite 800
Santa Ana, CA 92701

Allan Browne and Benjamin Schiebe
Browne & Woods
2400 Avenue of the Stars, Fourth Floor
Los Angeles, CA 90067

Executed on June 29, 1985 at Santa Monica, California. I declare under penalty of perjury, pursuant to California law, that the above is true and correct.

Betty Halliwell, Ph.D.
(Signature)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Halliwell v. Eu Civ.S. 82-147-LKK

Before Magistrate Esther Mix

Item # 24c (15 Record 215-216)

Senate's Order re Plaintiff's Motion for Disclosure

Filed July 2, 1985[24.03]

Plaintiff's Contextual Footnote:

24.03 This order was drafted pursuant to instructions by Magistrate Mix at the continued discovery hearing of May 23, 1985. The order was submitted to Plaintiff to secure his approval as to form on June 6, 1985, but Plaintiff responded to the Senate on June 7, 1985 that

> "[the order] is fatally deficient as to form because it avoids all mention of the grounds upon which the ruling is to be based. A losing party may not be entitled to question the logic of a court's order in these circumstances, but Plaintiff is entitled to insist that the Court's reasoning be included in the order. As the U.S. Supreme Court notes in Virginian Railway Co. v. United States (1926) 272 U.S. 658, 675:

> 'Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court . . . .'"

(15 Record 318.)

Subsequently, without responding to Plaintiff's exercise of his right to object to the form of the proposed order and without notification to Plaintiff, the Senate forwarded this order to the Court. Two weeks after the proposed order was lodged with the Court the Senate executed a proof of service noting that the proposed order was submitted to Plaintiff on June 28, 1985. (15 Record 172-173.) A copy of the signed order mailed by the Senate to Plaintiff on July 10, 1985 indicates that the order was lodged with the Court on June 14, 1985, signed by Magistrate Mix on June 28, 1985, and filed on July 2, 1985. Since the order itself calls for filings on June 13, 1985 and a hearing on June 27, 1985, it was obsolete by its own terms and in conflict with the properly executed order of June 17, 1985 (Item # 24a supra) setting a submissions deadline of July 11, 1985 and a hearing date of July 25, 1985. Since the District Court ruled sua sponte on July 9, 1985 that "this action is dismissed in its entirety", Plaintiff had no opportunity to try to unscramble this situation.

On May 23, 1985, in the courtroom of the Honorable Esther Mix, plaintiff Michael J. Halliwell's "Motion for Disclosure pursuant to Rule 37(a) F.R.Civ. Proc." came on regularly for hearing. Plaintiff appeared In Pro Per, Benjamin D. Scheibe of BROWNE & WOODS, appeared on behalf of The Senate of the State of California ("the Senate"), Barbara Brenner of REMCHO, JOHANSEN & PURCELL, appeared on behalf of The Assembly of the State of California ("the Assembly"), and Richard Nishite appeared on behalf of defendant March Fong Eu. The Court, having heard oral argument, and considered the papers filed by the parties:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that plaintiff's Motion for Disclosure Order, insofar as it is directed to the Senate and to the Assembly, is denied without prejudice to its refiling or renewal in the event that

the motion previously filed by plaintiff seeking reconsideration of the three-judge court's order entered March 27, 1984, is granted.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff's Motion for Disclosure Order, insofar as it is directed to defendant March Fong Eu, shall be, and hereby is, continued until June 27, 1985. The parties are directed to file any briefs regarding the timeliness of plaintiff's motion, as well as a concise stipulation pursuant to the terms of Rule 251, on or before June 13, 1985.

/s/ Esther Mix
Magistrate of the United States
District Court
Dated: June 28, 1985

Prepared by: BROWNE & WOODS
Benjamin D. Scheibe, Esq.
Attorneys for The Senate of the State of California

APPROVED AS TO FORM:

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MICHAEL HALLIWELL
Plaintiff In Propria Persona

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Halliwell v. Eu C.A. 85-2496

Before Circuit Judges Thomas Tang,

Melvin Brunetti and Alex Kozinski

Item #25a (16 Record 239)

Filed August 19, 1986

The Supreme Court has exclusive jurisdiction over this appeal.[25.01] 28 U.S.C. § 1253; MTM, Inc. v. Baxley, 420 U.S. 799 (1975);[25.02] Fusari v. Steinberg, 419 U.S. 379 (1975).[25.03] Appellees' motions to dismiss the appeal for lack of jurisdiction are denied. The Clerk will transfer the appeal to the Supreme Court of the United States. 28 U.S.C. § 1631.

Plaintiff's Contextual Footnotes:

25.01 Plaintiff responds at 16 Record 276:

"As Plaintiff notes at [16 Record 40] in his Docketing Statement and (at [16 Record 217] of) his opposition to the Assembly's challenge to the Ninth Circuit's jurisdiction, in United States v. United States District Court (1948) 334 U.S. 258, 263-264 the U.S. Supreme Court ruled:

> 'We put to one side the question whether another appeal in the case would be decided by the Circuit Court of Appeals or by this court, now that there is a quorum of Justices qualified to sit in it. No matter how that question were resolved, it is our opinion that the Circuit Court of Appeals has jurisdiction in this mandamus proceeding.
>
> '. . . It was early recognized that the power to issue a mandamus extended to cases where its issuance was either an exercise of appellate jurisdiction or in aid of appellate jurisdiction . . . .
>
> 'But the fact that mandamus is closely connected with the appellate power does not necessarily mean that the power to issue it is absent where there is no existing or future appellate jurisdiction to which it can relate. . . . It is, indeed, a high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to . . .

a higher court's . . . past exercise of jurisdiction . . . [or] a present or future one.'"

25.02 Plaintiff responds at 16 Record 247-248:

"In 28 U.S.C. § 1253 Congress has added an important procedural safeguard where the usual intermediate level of appellate review is to be removed: a direct appeal to the U.S. Supreme Court will be in order only if the granting or denial of injunctive relief takes place after notice and hearing. The order of August 19, 1986 completely ignores Plaintiff's demonstration (at [16 Record 190-195] of his opposition to the Assembly's motion) that there is no claim in this case which has been disposed of after the hearing required by § 1253 that also satisfies MTM v. Baxley's requirement that the District Court's disposition 'rests upon resolution of the merits of the constitutional claim presented below' 420 U.S. at 804. Yet the order cites Baxley in support of an alleged exclusive Supreme Court jurisdiction over this appeal."

25.03 Plaintiff responds at 16 Record 247:

"Fusari v. Steinberg (1975) 419 U.S. 379, 388 n. 13 notes:

'[A]n appeal under 28 U.S.C. § 1252 brings the "whole case" before the Court. . . . The same principle governs appeals brought under 28 U.S.C. § 1253.'

It may be that this 'whole case' doctrine reserves to the Supreme

Court a decision on the merits of Plaintiff's claims for injunctive relief and all underlying constitutional or alternate grounds for disposing of same. But this doctrine in no sense absolves the Ninth Circuit of its responsibility to make a whole case available for the High Court's consideration. Certainly reasonable discovery by Plaintiff, consideration of all jurisdictionally substantial claims, and rulings which do not ignore or flatly misrepresent fundamental legal and factual issues are all essential elements of any case which is in fact ready for final disposition by the U.S. Supreme Court."

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Halliwell v. Eu C.A. 85-2496

Before Judges Tang, Brunetti and Kozinski

Item #25b (16 Record 259)

Filed November 5, 1986

Appellant's petition for reconsideration of the order transferring this appeal to the Supreme Court of the United States[25.04] is denied.[25.05]

Plaintiff's Contextual Footnotes:

25.04 Plaintiff responds at 16 Record 267-269:

"Even if there were some way of justifying the procedural conduct of the District Court and denying all of the mandamus relief sought by Plaintiff, the substantive aspects of all the rulings challenged by Plaintiff's notice of appeal still would fall within the appellate jurisdiction of the Ninth Circuit.

"1. It is clear from the invocation of MTM, Inc. v. Baxley, 420 U.S. 799 (1975) by the order of August 19, 1986 that this court realizes that the rejection of Plaintiff's congressional claim on grounds of mootness cannot justify a direct appeal to the U.S. Supreme Court.

"2. Even if the refusal by the three-judge court to rule on Plaintiff's motion for a declaratory judgment on senate district misnumbering were construed as a denial, Ninth Circuit jurisdiction over any appeal from this disposition is squarely affirmed by Socialist Workers Party v. Eu 591 F.2d 1252,

1256-59 (9th Cir. 1978), cert. denied, 441 U.S. 946 (1979) cited by the Assembly's memorandum of May 19, 1986.

"3. The dismissal with prejudice of Plaintiff's senate claim by the order of March 27, 1984 [at 12 Record 238-239] is justified by the District Court because

> 'Plaintiff's allegation that the apportionment plan discriminates against Republicans avails him nothing. There is no authority for the proposition that a reapportionment plan that discriminates on the basis of political party offends the Equal Protection Clause. . . . The Supreme Court has invalidated only those apportionment plans which neutralize or exclude racial or ethnic minority groups. . . . Thus the Plaintiff's complaint that the challenged plan disadvantages Republicans does not state a claim upon which relief can be granted.'

"As Plaintiff notes [at 16 Record 38] in his Docketing Statement, this finding that partisan gerrymandering is a grievance unworthy of adjudication is appealable to the circuit courts; see Simkins v. Gressette (1980) 631 F. 2d 287. Moreover, the Ninth Circuit has a clear duty to vacate this dismissal in light of Davis v. Bandemer (1986) 106 S.Ct. 2797, 2807, where the Supreme Court determined that 'the political gerrymandering claim in this case is justiciable,' and the Court notes, 'As Gaffney [412 U.S. at 751-752]

demonstrates, that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability.' Id. at 2806.

"4. The summary judgment granted to the Assembly does not come within the ambit of 28 U.S.C. § 1253 because (as Plaintiff explained [at 16 Record 193] in his May 28, 1986 Opposition to the Assembly) no hearing was held on this 'out-of-season' motion. Therefore neither MTM v. Baxley supra nor any other governing precedent authorizes a direct appeal to the Supreme Court of the District Court's disposition of Plaintiff's Assembly claim.

"5. Even if Plaintiff is deemed not to be entitled to a ruling by the full three-judge panel on his petition for leave to amend, the propriety of Judge Karlton's actions is clearly appealable to the Ninth Circuit. See Idlewild Bon Voyage Liquor Corp. v. Epstein (1962) 370 U.S. 713, 715-716, cited by Plaintiff (at 31) in his opposition to the Assembly.

"6. The refusal of the full three-judge panel to rule on joinder of the California Supreme Court involves the same definition of 'the province of a three-judge court' that Epstein supra affirms is within the jurisdiction of circuit courts.

"7. The pending discovery motions left hanging by the District Court's sua sponte termination of the action are plainly outside the scope of 28 U.S.C. § 1253, and even if refusal to rule on them is treated as denials by the District

Court, such a disposition can hardly be the basis for a direct appeal to the U.S. Supreme Court.

"8. The restoration of normal communications is a purely procedural matter without any substantive aspect relating to the constitutionality of the contested districts. It is therefore certainly no basis for a direct appeal to the U.S. Supreme Court."

25.05 Plaintiff responds at 16 Record 328-330:

"The District Court's sua sponte termination of the action without addressing many vital issues in the case or even ruling on long-pending motions which had been fully briefed created a procedural snarl which has become progressively more tangled as the panel charged with consideration of C.A. #85-2496 has tried to find some way to dispose of Plaintiff's petition without ruling on the validity of his procedural grievances. Since Judges Tang, Brunetti and Kozinski refuse to address the circumstances of the case in either of their two orders the position of the court on the issues raised in briefing is totally obscure.

"Plaintiff warned in his September 20, 1985 Docketing Statement [at 16 Record 35-36]:

> 'The U.S. Supreme Court notes in Roche v. Evaporated Milk Assn. (1943) 319 U.S. 21, 26 that the issuance of a writ of mandamus to an inferior court is appropriate "to compel it to exercise its authority

> when it is its duty to do so." The District Court's flouting of the expedited consideration requirements of 28 U.S.C. § 2284 has been so egregious that both the 1982 and the 1984 legislative elections were conducted without any adjudication of Plaintiff's challenge to the constitutionality of the districts used in them, and unless the District Court is compelled to discharge its duty to adjudicate, the same fate appears likely to befall the 1986 elections. In Hall v. West, District Judge (1964) 335 F.2d 481 mandamus was applied to overcome similar delaying tactics by the District Court.'

Clearly the circumstances of the case required at least the precedence over other civil appeals that is mandated by the Federal Rules of Appellate Procedure, but the Ninth Circuit's response was to wait until the 1986 elections also had passed into history, then refuse to rule on whether Plaintiff was entitled to mandamus.

"Plaintiff argued in his September 20, 1985 Docketing Statement [at 16 Record 36]:

> 'The Supreme Court ruled in Will v. United States (1967) 389 U.S. 90, 100: "The legal proposition that mandamus will lie in appropriate cases to correct willful disobedience of the rules laid down by this court is not controverted." Plaintiff does not seek to control the District Court's

> decision on the merits of any of his claims but simply to require that the Court follow the Federal Rules of Civil Procedure and thereby allow compilation of at least a minmally adequate factual record.'

See Docketing Statement at [16 Record 36-37] for a summary of Plaintiff's procedural grievances. At no time during the 14 months that the Ninth Circuit had C.A. #85-2496 under consideration did any of Defendants provide any justification for any of the procedural outrages which Plaintiff sought to rectify or provide grounds for denying any of the eight specific forms of procedural relief requested in Plaintiff's August 31, 1985 petition for mandamus. In their order of August 19, 1986 Judges Tang, Brunetti and Kozinski refuse to even consider Plaintiff's entitlement to mandamus and made no mention of any aspect of the case at all. This order simply cites two precedents without the slightest explanation of why they allegedly preclude circuit court jurisdiction over Plaintiff's petition for mandamus. In response to Plaintiff's motion for reconsideration of August 26, 1986 Judges Tang, Bruentti, and Kozinski waited ten weeks, until the day after the 1986 general election, and then simply washed their hands of Halliwell v. Eu without any explanation whatsoever."

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Halliwell v. Eu C.A. 85-2496

Before Judges Tang, Brunetti and Kozinski

Item # 25c (17 Record 157-158

Filed February 26, 1987

Appellant's motion for clarification of our prior orders in this case is denied, as is his request for a stay of the transfer of his appeal to the Supreme Court. Appellant fails to comprehend that the jurisdiction of the Supreme Court under 28 U.S.C. § 1253 depends not on the nature of the issues he may seek to raise, but on the nature of the order entered by the district court.[25.06] We will not entertain any further requests for reconsideration, clarification, or the like.[25.07]

Appellant, we note, has also sought an en banc hearing, expressly disavowing any desire for a rehearing en banc. His request is factually impossible and is denied on that ground.[25.08]

The Clerk will forthwith effectuate our order of August 19, 1986, by transferring this appeal to the Supreme Court of the United States. No further sub-

missions from appellant will be received in this cause.[25.09] The Clerk shall return to appellant any proffered filings.[25.10]

Plaintiff's Contextual Footnotes:

25.06 Plaintiff responds at 17 Record 165: "Unfortunately neither of the panel's two prior orders had said anything about 'the nature of the order entered by the district court.' The second order (of November 5, 1986) is a flat denial of reconsideration without any explanation, and the Court's order of August 19, 1986 states in its entirety:

> 'The Supreme Court has exclusive jurisdiction over this appeal. 28 U.S.C. § 1253; MTM, Inc. v. Baxley, 420 U.S. 799 (1975); Fusari v. Steinberg; 419 U.S. 379 (1975). Appellees' motions to dismiss the appeal for lack of jurisdiction are denied. The Clerk will transfer the appeal to the Supreme Court of the United States. 28 U.S.C. § 1631.'

Since there is no order by Judges Tang, Bruentti and Kozinski that says anything at all about any order issued by the District Court, it is impossible for any litigant to determine which aspect of some prior decision the panel has in mind which allegedly established that 'the Supreme Court has exclusive jurisdiction over this appeal.'"

25.07 Plaintiff argues, "The Ninth Circuit Panel Has No Basis in 'the Nature of the Order Entered by the District Court' for its Jurisdictional Ruling" at 17 Record 165-166:

"In Plaintiff's August 26, 1986 motion for reconsideration of this order he notes (at 16 Record 245) that MTM v. Baxley supra quotes language from § 1253 which limits that statute's coverage to 'an order granting or denying, after notice and hearing, an interlocutory or permanent injunction,' (emphasis added,) and that the Baxley court also held that 'a direct appeal will lie to this court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.' 420 U.S. at 804. Emphasis added.

"Plaintiff's motion cited prior briefing which showed that the only denial of injunctive relief by the District Court after notice and hearing was on the following ground:

> 'In these circumstances, the ordering of a new election as requested by the Plaintiff would not be an appropriate exercise of the Court's equitable powers.' Order of March 27, 1984 at 12 Record 244.

"This same order unequivocally states that this denial of injunctive relief does not 'rest upon resolution of the merits of the constitutional claim presented' (as required by Baxley, supra). (Emphasis added.) At 12 Record 244 the order of March 27 continues,

> 'In holding that we would not, in any event, grant the relief requested in this case we do not pass upon the question of when, if ever, vote accelera-

> tion and deferral can rise to the level of constitutional infirmity. In addition, we express no opinion as to the appropriate relief in circumstances other than those before us.' Emphasis added.

This same briefing also notes that the denial of a proposed November 8, 1983 special election for assembly districts by the order of March 27, 1984 (at 12 Record 255) on the ground that this proposal was 'obviously moot' was without any hearing by the three-judge court on any aspect of 'the constitutional claim presented.' Also noted in briefing was the fact that no hearing was ever held on Plaintiff's congressional claim. Instead the Court waited until July 9, 1985 and dismissed Plaintiff's complaint 'to the degree it complains of the 1982 congressional apportionment or redistricting plan' on the ground that this claim was moot because 'the relief sought has become impossible to grant due to the passage of time.' See 15 Record 199, 202. Briefing also documented Plaintiff's repeated efforts to secure adjudication of his Board of Equalization claim, which the District Court completely ignores in all of its orders.

"Thus the remaining claims on which no hearing was ever held and which were therefore outside the scope of 28 U.S.C. § 1253 never had their constitutional merits resolved either."

25.08 Plaintiff responds at 17 Record 341-346:

"Plaintiff's March 6, 1987 supplementary updating of his December 1, 1986 petition to the Ninth Circuit en banc states concerning 'prior charges of obstruction of justice in Halliwell v. Eu which the Ninth Circuit has thus far not chosen to investigate':

'In my en banc petition of December 1, 1986 I observe:

"During the nearly five years of Halliwell v. Eu every opinion of the District Court has read like a lawyer's brief which sidesteps all aspects of the case where the facts are adverse to his client's position. Where it has been impossible to sidestep glaring constitutional flaws in the contested districts the District Court has either (a) waited until Plaintiff's motion has become obsolete, (b) refused to rule after briefing is completed, or (c) cut short briefing, held no hearing, and disposed of the motion without addressing its merits.

"Such a process of adjudication makes a mockery of the concept of the rule of law, and the refusal of the Ninth Circuit to force the District Court to follow governing Supreme Court precedents

indicates that judicial 'in-group solidarity' has been given precedence over the oaths of office of Judges Wright, Hug, Tang, Brunetti, and Kozinski. When viewed in their totality, the various tactics used to thwart adjudication in Halliwell v. Eu and preserve the political status quo in California clearly amount to a systematic obstruction of justice. Judge Karlton has sought to cover up the misconduct of the California Supreme Court, Judges Ramirez and Kennedy have sought to protect the reputation of Judge Karlton, and all five of the Circuit Judges who have considered Plaintiff's appeals have engaged in a coverup of this coverup.

"It is abundantly obvious that Plaintiff has no chance at all of securing a record adequate to permit a Supreme Court judgment on the merits of his constitutional claims until this massive coverup is halted. Therefore Plaintiff respectfully moves that the Ninth Circuit en banc establish a fact-finding tribunal to investigate [this situation]." 16 Record 334-335. Emphasis in original.' (17 Record 163-164.)

"Plaintiff's March 6, 1987 petition quotes this passage from the February 26, 1987 order of Judges Tang, Brunetti and Kozinski: 'Appellant, we note, has also sought an en banc hearing, expressly disavowing any desire for a rehearing en banc. His request is factually impossible and is denied on that ground.' Plaintiff's petition states regarding 'the panel's attempt to thwart en banc consideration of their own prior misconduct' at 17 Record 168:

> 'When the [denial of clarification by] the order of February 26, 1987 is viewed against the background of the totally obscure orders of August 19, 1986 and November 5, 1986 it is clear that the pattern of judicial evasiveness complained of in Appellant's December 1, 1986 en banc petition has been aggravated, not mitigated, by events since then. Plaintiff has as yet received no response to his December 1, 1986 request that this ongoing judicial coverup be investigated by the Ninth Circuit. The fact that the December 1, 1986 petition calls for an investigation of charges of deliberate obstruction of justice rather than for a rehearing on the jurisdictional issue decided without explanation by Judges Tang, Brunetti and Kozinski is cited by the same Judges alleged to be obstructing justice as a technical reason for denying the request.

> 'Surely it is not Ninth Circuit policy that Judges allegedly guilty of deliberate sabotage of the judicial process may block an investigation of their own conduct. Yet this is precisely what the order of February 26, 1987 attempts to do with the following ruling: "No further submissions from Appellant will be received in this cause. The Clerk shall return to Appellant any proffered filings."'

"In his March 16, 1987 motion to Judge Browning for reconsideration of the refusal to file his en banc submissions of March 6, 1987 Plaintiff contends,

> 'Rule 35(b) of F.R.A.P. provides in connection with a party's suggestions that an en banc hearing might be appropriate in his case that "the clerk shall transmit any such suggestion to the judges of the court who are in regular active service."' (17 Record 234.) '[T]here are no exceptions to the rule that every active-service member of a court of appeals must receive a party's suggestion for en banc consideration. In Shenker v. Baltimore & Ohio Railroad (1963) 374 U.S. 1, 5 the opinion notes: "the rights of the litigant [include] . . . the right to suggest that the en banc procedure be set in motion in his case. . . . [Thus] every petition for rehearing is submitted to every member of the

court. . . ."'

'The 35 copies of Plaintiff's letter updating his December 1, 1986 en banc petition and 35 copies of his separate March 6, 1987 en banc petition were accompanied by 2 copies of a letter to Ms. Cathy Catterson, Clerk of the Ninth Circuit Court of Appeals (copy attached). This letter clearly explained why the unwillingness of Judges Tang, Brunetti and Kozinski to consider any further submissions had no effect on Plaintiff's right and/or obligation to file other materials pursuant to the cited portions of Supreme Court Rules and Federal Rules of Appellate Procedure. Plaintiff's letter to Ms. Catterson concluded:

> "Given the extreme sensitivity of Plaintiff's allegation that a politically inspired obstruction of justice is taking place in Halliwell v. Eu, it would be appropriate that any departure from the usual filing and distribution procedures that is required of you or any member of your staff be made pursuant to a specific written instruction which is itself made part of the case file."

'All of Plaintiff's invocations of specific rules which should have governed the treatment of his submissions and his request for an official acknowledgement of any depar-

ture from these rules were ignored. Plaintiff's submissions were returned to him without any statement of what rule or whose authority justified such a rejection. Besides Plaintiff's materials submitted for en banc consideration and both copies of his letter to Ms. Catterson, Plaintiff received only a copy of the order of February 26, 1987 with the following portions underlined in red:

> "We will not entertain any further requests for reconsideration, clarification, or the like. . . . No further submissions from appellant will be received in this cause. The Clerk shall return to appellant any proffered filings."

'Clearly in these circumstances Plaintiff-Appellant is entitled to a ruling by the Chief Judge of the Ninth Circuit on his right to file the disputed submissions which either accepts the filings or cites some rule of law which justifies their rejection.' (17 Record 238-239.) Emphasis in original."

25.09 Plaintiff protests at 17 Record 346-347:

"On April 9, 1987 Plaintiff's Notice of Appeal was returned to him by the Ninth Circuit. The Notice was marked, 'RECEIVED Clerk, U.S. Court of Appeals MAR 30 1987,'

but spaces for date filed and docketed were left blank. The returned Notice of Appeal was accompanied by a xeroxed copy of the order of February 26, 1987, with 'COPY' stamped in blue on its face and the initials, 'M.B.', inscribed in the upper left corner.

"Since Supreme Court Rule 12.1 tolls the time limit for docketing an appeal pursuant to 28 U.S.C. § 1253 (which is the alleged basis for transferring jurisdiction over Plaintiff's appeal to the Supreme Court) 'from the filing of the notive of appeal,' the peremptory refusal to file Plaintiff's Notice strikes directly at Plaintiff's right to appeal. Furthermore, Supreme Court Rule 15.1 requires that the Jurisdictional Statement include 'A copy of notice of appeal showing the date it was filed and the name of the court where it was filed,' and Rule 12.3 specifies that in order to complete the docketing process appellant must 'comply in all respects with Rule 15.'

"Moreover, when jurisdiction is transferred under 28 U.S.C. § 1631 the notice of appeal is the only available means of indicating in a timely fashion whether an appellant wishes to challenge the lower court's jurisdictional determination or pursue an appeal on the substantive merits.

"Plaintiff has been unable to find any other case in which a court whose actions are being appealed has refused to file a timely notice of appeal. Clearly the refusal to file Plaintiff's Notice of Appeal

without reference to any rule which justifies this refusal is antithetical to the interests of justice."

25.10 Plaintiff concludes his April 29, 1987 petition to Judge Browning at 17 Record 347-348:

"Plaintiff hereby requests a ruling by the Chief Judge of the Ninth Circuit which explicitly addresses the following points:

(1) Plaintiff's right to file his March 27, 1987 Notice of Appeal from the order of February 26, 1987.

(2) Plaintiff's right to have his March 6, 1987 submissions to the Ninth Circuit en banc forwarded to the active-service members of the Court.

(3) Plaintiff's right to a reasoned disposition of the jurisdictional question decided without explanation by the order of February 26, or, if no member of the Ninth Circuit is willing to request a vote on this issue, a written notification of this fact.

(4) Plaintiff's right to issuance of the writ of mandamus sought by his August 31, 1985 petition, or if no member of the Ninth Circuit is willing to request a vote on this issue, a written notification of this fact.

(5) Plaintiff's right to an investigation of his allegations of systematic obstruction of justice set forth in his December 1, 1986 petition to the Ninth Circuit en banc and his April 29, 1987 analysis of the treat-

ment by the Ninth Circuit of C. A. 82-4453, C.A. 84-1859, and C.A. 85-2496, or if no member of the Ninth Circuit is willing to request a vote on this issue, a written notification of this fact.

"Plaintiff notes that 2/3 of the period established by Supreme Court Rules for an appeal from the order of February 26, 1987 has been used up by the attempts by Judges Tang, Brunetti and Kozinski to sabotage Plaintiff's ability to knowledgeably exercise his right to appeal. Therefore Plaintiff urges that (unless a stay of the tolling of time for an appeal is issued by the Ninth Circuit) rulings in response to this petition be issued as promptly as possible."